S. HRG. 99-532, PT. 1

VARIOUS AUTHORIZATIONS TO UNITS OF THE NATIONAL PARK SYSTEM AND AN ADDITION TO THE WILD AND SCENIC RIVER SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON PUBLIC LANDS, RESERVED WATER AND RESOURCE CONSERVATION

OF THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

SECOND SESSION

ON

S.J. Res. 221

A RESOLUTION TO AUTHORIZE THE CONTINUED USE OF CERTAIN LANDS WITHIN THE SEQUOIA NATIONAL PARK BY PORTIONS OF AN EXISTING HYDROELECTRIC PROJECT

H.J. Res. 382

A RESOLUTION TO AUTHORIZE THE CONTINUED USE OF CERTAIN LANDS WITHIN THE SEQUOIA NATIONAL PARK BY PORTIONS OF AN EXISTING HYDROELECTRIC PROJECT

H.R. 3851

AN ACT TO AMEND SECTION 901 OF THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT

JANUARY 30, 1986

PART 1

Printed for the use of the Committee on Energy and Natural Resources

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VARIOUS AUTHORIZATIONS TO UNITS OF THE NATIONAL PARK SYSTEM AND AN ADDITION TO THE WILD AND SCENIC RIVER SYSTEM

THURSDAY, JANUARY 30, 1986

U.S. SENATE, SUBCOMMITTEE ON PUBLIC LANDS, RESERVED WATER AND RESOURCE CONSERVATION, COMMITTEE ON ENERGY AND NATURAL RESOURCES,

Washington, DC.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room SD-366, Dirksen Senate Office Building, Hon. Malcolm Wallop, presiding.

Present: Senators Wallop and Hecht.

Also present: Tony Bevinetto, professional staff member; and Thomas B. Williams, professional staff member for the minority.

OPENING STATEMENT OF HON. MALCOLM WALLOP, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator WALLOP. My apologies to all who turned up on time. Congress, you will be pleased to know, is engaged in a struggle with how to live with what it passed upon itself—Gramm-Rudman.

If you can believe it, I think there is cause for celebration. We are in fact going to reduce ourselves by 4.2 percent. Despite all kinds of efforts to struggle out from under it, there is no way for us to hide from that, and the time we spent away from here was probably the most valuable I have spent since I have been in the Senate.

This morning the Subcommittee on Public Lands, Reserved Water and Resource Conservation will hear testimony on the following measures: H.R. 3851, to amend section 901 of the Alaska National Interest Lands Conservation Act; Senate Joint Resolution 221 and House Joint Resolution 382, to authorize the continued use of certain lands within the Sequoia National Park by portions of an existing hydroelectric project.

I will place a copy of each of these measures in the hearing record.

H.R. 3851 would amend section 901 of the Alaska National Interest Lands Conservation Act to defer for 1 year a statute of limitations on legal challenges to ownership of submerged lands in Alaska conveyed by the United States pursuant to the Alaska Native Claims Settlement Act.

Unless we move quickly to approve this extension of the statute of limitations, the State of Alaska will be forced to decide early this

year whether to file numerous lawsuits challenging conveyances to Native corporations and groups since December 2, 1980.

This measure merely provides for simple extension of the statute of limitations; the problems associated with the submerged lands issue still remain. I would urge the State of Alaska, the Natives, the Department of the Interior, and all interested parties to work toward a consensus on this issue.

Senate Joint Resolution 221 and House Joint Resolution 382 authorize the Secretary of the Interior to permit the continued use of lands within the Sequoia National Park by Southern California Edison Co. for a hydroelectric facility. The committee also needs to act expeditiously on this legislation because the last authorization to operate the project expired on December 14, 1985. To facilitate such early action, I would urge that the committee consider the House-passed measure.

Both H.R. 3851 and House Joint Resolution 382 are on the committee's business meeting agenda. I would urge Chairman McClure to bring both measures up at the earliest time.

The hearing record will remain open for 1 week after today, during which time written testimony on any of these measures can be submitted to the subcommittee. In the interest of time, I would ask the witnesses to limit their testimony to 5 minutes. Additional written comments may be provided and the entire testimony, oral and written, will be included in the hearing record.

I understand that Senator Murkowski is chairing a hearing before the Veterans' Affairs Committee and will be unable to join us until later in the morning. He will have a statement for the record regarding H.R. 3851.

[The texts of Senate Joint Resolution 221, House Joint Resolution 382, and H.R. 3851 follow:]

99TH CONGRESS
1ST SESSION

S. J. RES. 221

To authorize the continued use of certain lands within the Sequoia National Park by portions of an existing hydroelectric project.

IN THE SENATE OF THE UNITED STATES

OCTOBER 21, 1985

Mr. CRANSTON (for himself and Mr. WILSON) introduced the following joint resolution; which was read twice and referred to the Committee on Energy and Natural Resources

---

JOINT RESOLUTION

To authorize the continued use of certain lands within the Sequoia National Park by portions of an existing hydroelectric project.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to issue a permit for portions of an existing hydroelectric project, known as the Kaweah Project of Southern California Edison Company, to continue to occupy and use lands of the United States within Sequoia National Park as necessary for continued operation and maintenance.

SEC. 2. The term of such permit shall expire not later than the expiration of existing or future licenses for the Kaweah Project as may be granted by the appropriate agency of the United States to Southern California Edison Company.

SEC. 3. The permit shall contain a provision prohibiting expansion of the Kaweah Project in Sequoia National Park and shall also contain such other terms and conditions as the Secretary of the Interior shall deem necessary for the protection and utilization of Sequoia National Park.

99TH CONGRESS
1ST SESSION

H. J. RES. 382

IN THE SENATE OF THE UNITED STATES

NOVEMBER 19 (legislative day, NOVEMBER 18), 1985
Received; read twice and referred to the Committee on Energy and Natural Resources

JOINT RESOLUTION

To authorize the continued use of certain lands within the Sequoia National Park by portions of an existing hydroelectric project.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized to issue a permit for ten years, and may issue not more than two renewals of equivalent duration, for portions of an existing hydroelectric project, known as the Kaweah Project of Southern California Edison Company, to continue to occupy and use lands of the United States within Sequoia National Park as necessary for continued operation and maintenance.

SEC. 2. The Secretary shall not execute any permit renewal prior to sixty calendar days from the date the same is

submitted to the Committee on Energy and Natural Resources of the United States Senate and to the Committee on Interior and Insular Affairs of the United States House of Representatives.

SEC. 3. The permit shall contain a provision prohibiting expansion of the Kaweah Project in Sequoia National Park and shall also contain such other terms and conditions as the Secretary of the Interior shall deem necessary and proper for the management and care of Sequoia National Park and the purposes for which it was established.

Passed the House of Representatives November 14, 1985.

Attest: BENJAMIN J. GUTHRIE,

Clerk.

99TH CONGRESS
1ST SESSION

H. R. 3851

IN THE SENATE OF THE UNITED STATES

DECEMBER 12 (legislative day, DECEMBER 9), 1985

Received; read twice and referred to the Committee on Energy and Natural Resources

AN ACT

To amend section 901 of the Alaska National Interest Lands Conservation Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (a) of section 901 of the Alaska National Interest Lands Conservation Act (Public Law 96–487) is hereby amended by striking the words "five years after the date of execution" each time such words occur in such subsection, and by inserting in lieu thereof in each instance the words "six years after the date of execution".

Passed the House of Representatives December 12, 1985.

Attest: BENJAMIN J. GUTHRIE,
Clerk.

Senator WALLOP. At this time I would like to call our first panel from the Department of the Interior, James M. Parker and P. Daniel Smith.

Good morning.

Mr. PARKER. Good morning.

Senator WALLOP. Mr. Parker, would you proceed, please?

STATEMENT OF JAMES M. PARKER, ASSOCIATE DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

Mr. PARKER. Yes, Mr. Chairman.

I appreciate the opportunity to appear before the committee today. I appreciate your inclusion of the full text of my formal statement. It contains considerable information on the broader issues involved in the submerged lands controversy. I think it will add perspective to your consideration of the narrower issue involved in H.R. 3851.

Section 6 of the Alaska Statehood Act allowed the State of Alaska to select some 103.35 million acres of vacant, unappropriated, and unreserved public land. That act also provided that the State took title to submerged lands beneath navigable waters that had not been reserved to the United States under the Submerged Land Act or other laws.

Under the Alaska Native Claims Settlement Act, Native corporations were entitled to select 44 million acres of public lands. In this context, the Department interpreted the term "public lands" to include submerged lands beneath nonnavigable waters.

A final determination as to the navigability of a body of water can only be made by the courts. Judicial determinations have never been made on the overwhelming majority of lakes and rivers in Alaska. Thus, the BLM in its effort to convey the lands that have been selected by the State and by the Native corporations has been required to make the initial determination as to navigability of hundreds of lakes and rivers.

As a result the navigability question, or the nonnavigability question of water bodies, has been an issue of contention since the enactment of the Alaska Statehood Act and ANCSA.

The State has felt that some of the water bodies covering submerged lands that have been conveyed to the Native corporation are navigable and that the involved submerged lands should be recognized as having been granted to the State under the Statehood Act.

The Native corporations have, therefore, found it necessary to challenge the initial navigability decisions to ensure that they will not be deprived of any portion of their entitlement.

The problem concerning navigability decisions was addressed by the Congress in section 901 of ANILCA, which established a 5-year statute of limitations for conveyances, executed after December 2, 1980. The statute of limitations for these conveyances therefore began to run, as you pointed out, on December 2, 1985.

Since the State has not made a final determination as to which decisions or conveyances it wishes to challenge, it must either challenge all of the conveyances that are subject to the 5-year statute

of limitations or risk the possibility of being precluded from challenging some of the conveyances and decisions.

The extension of the 5-year statute of limitations for 1 year, as proposed under H.R. 3851, would help resolve the State's problem and would also benefit the BLM. Given the circumstances, we support the extension of the statute of limitations for 1 year. The additional year will allow the State to focus on those conveyances and decisions it wishes to challenge. The resulting decrease in the number of suits that would be filed would lessen the administrative costs that would be incurred by BLM in defending its navigability decisions.

In addition, it is expected that the Federal courts will clarify the definition of "navigability" during the upcoming year. It is for these reasons that we recommend the enactment of H.R. 3851.

I would be pleased to respond to any questions.

[The prepared statement of Mr. Parker follows:]

JAN 30 1986

STATEMENT OF JAMES M. PARKER, ASSOCIATE DIRECTOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS, RESERVED WATER, AND RESOURCE CONSERVATION, COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES SENATE, ON H.R. 3851, AN ACT "TO AMEND SECTION 901 OF THE ALASKA NATIONAL INTEREST LANDS CONSERVATION ACT."

I appreciate the opportunity to appear before the subcommittee today to discuss the Department of the Interior's position on H.R. 3851.

H.R. 3851 would extend, for one year, the 5-year statute of limitations established by section 901 of the Alaska National Interest Lands Conservation Act (ANILCA) covering the initiation of lawsuits challenging navigability decisions by the Secretary of the Interior, as they apply to those conveyances of submerged lands to Native corporations that were made after the passage of ANILCA.

To add perspective to H.R. 3851, I would like to briefly sketch out the historical background of the Department of the Interior's current policy on submerged lands.

Since the passage of the Act of May 18, 1796, it has been the law that the title to lands bordering on nonnavigable streams extends to the center of the streams. Further, in 1891, in the case of Hardin v. Jordan, 140 U.S. 371, the Supreme Court decided that the title of grantees of lands bordering on

nonnavigable lakes or ponds extends to the center of the lake or pond. The Department has applied these principles consistently to land conveyances in both the lower 48 states and Alaska, except as to selections by the State of Alaska under the Alaska Statehood Act and to selections by Native Corporations under the Alaska Native Claims Settlement Act (ANCSA).

Thus, when a State or other entity, other than the State of Alaska or a Native Corporation, was entitled to select a certain amount of land which included land covered by nonnavigable waters, the grantee was not charged for the submerged lands when the acreage of the remcining entitlement was calculated. This longstanding policy is reflected in the Bureau of Land Management's (BLM) Manual of Surveying Instructions (Manual), which includes instructions for meandering rivers and lakes and calculating the acreage of fractional sections. The Manual provides that navigable bodies of water, as well as all lakes equal to or larger than 50 acres, and streams and rivers equal to or wider than 3 chains (198 feet), are to be excluded from the public lands.

Section 6 of the Alaska Statehood Act allowed the State of Alaska to select 103.35 million acres of vacant, unappropriated, unreserved public land. That Act also provided that the State took title to submerged lands beneath navigable waters that had not been reserved to the United States under the Submerged Lands Act or other law. However, section 6(g) of the Alaska Statehood Act provides that where lands selected by the State are unsurveyed,

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the Secretary of the Interior is to survey the exterior boundaries of the selected area and issue a patent for such selected area in terms of the exterior boundary survey. In accordance with this instruction, BLM surveyed only the perimeter of the State's selections and did not meander the submerged lands within the selected areas.

Under ANCSA, Native corporations were entitled to select 44 million acres of public lands. In this context, the Department interpreted the term "public lands" to include submerged lands beneath nonnavigable waters.

A final determination as to the navigability of a body of water can only be made by a court, and such judicial determinations have never been issued on the overwhelming majority of lakes and rivers in Alaska. Thus, the BLM, in its efforts to convey the lands that have been selected by the State and the Native corporations, has been required to make initial determinations as to the navigability of hundreds of lakes and rivers.

If BLM found that a body of water within a Native selection is navigable, the land underlying the waterbody was held to belong to the State and was not charged against the Native corporation's entitlement. If the waterbody was found to be nonnavigable, the selected lands were conveyed to the Native corporation and charged against its entitlement - an apparent contradiction of the Department's longstanding policy in the lower 48 states. Similarly, when the State made selections of lands containing nonnavigable bodies of water, BLM charged the submerged lands against the State's entitlement.

As a result, the navigability and nonnavigability of water bodies, and the chargeability of submerged lands have been issues of contention since the enactment of the Alaska Statehood Act and ANCSA. In particular, the State believes that the water bodies covering many of the submerged lands that have been conveyed to the Native corporations are navigable, and that the involved lands should have been recognized as having been granted to the State by the Statehood Act. Native corporations have found it necessary to challenge the initial navigability decisions to insure that they will not be deprived of any portion of their entitlements.

Further, the State and the Native corporations have long contended that the Manual should be followed when lands in Alaska are conveyed. The Native corporations have also asserted that they should not be charged for federally-owned submerged lands which they have selected.

In an attempt to resolve submerged lands inequities, the involved parties negotiated a new policy concerning the chargeability of submerged lands. The new policy was published in the Federal Register of December 5, 1983, and was subsequently reiterated in a March 28, 1984, Memorandum of Understanding between the State of Alaska and the Department of the Interior, and in a final rulemaking amending the provisions of the Alaska Native Selection regulations (43 CFR 2650) that was published in the Federal Register on April 19, 1985.

The basic provisions of the new policy are --

- Submerged lands beneath all water bodies shall be meandered in accordance with the principles in the Bureau of Land Management's Manual of Surveying Instructions. Whenever feasible, photogrammetry is to be used in surveying meander lines and planimetry is to be used for acreage computations of the upland lots on plats of survey.

- Alaska Native corporations and the State shall not be charged for submerged lands beneath water bodies that are meandered in accordance with the new policy (i.e., in accordance with the Manual or subsequent regulations);

- Those beds of tidal waters which were reserved to the United States at the time of statehood and are less than 50 acres or 3 chains in width will not be meandered and will be charged against Native and State entitlements.

Implementation of the new policy is having the following benefits:

- The Native corporations and the State are not receiving less land than Congress specified, since there is no charge for submerged lands that are meandered.

- Treatment of landowners in Alaska is consistent with the treatment of landowners in the lower 48 states.

- There is less likelihood that protracted litigation will occur, thus reducing delays in issuing conveyances.

- Since the State, the Native Corporations, and the Department of the Interior have concurred in the new policy, a major source of friction has been removed.

The problem concerning navigability decisions was addressed by the Congress in section 901 of ANILCA, which established time frames and procedures for challenging such decisions. Specifically, section 901(a) provides that the ownership by a Native corporation or Native group of a parcel of submerged land conveyed to such corporation or Group pursuant to either ANILCA or ANCSA, or a decision by the Secretary of the Interior that the water covering such

parcel is not navigable, shall not be subject to a judicial determination unless a civil action is filed in the United States District Court within 5 years after the date of the execution of the involved conveyance, if the conveyance was executed after December 2, 1980, the date of enactment of ANILCA. A 7-year statute of limitations applies if the conveyance or patent was executed before the date of enactment of ANILCA.

Although the new policy concerning the chargeability of submerged lands has eliminated many of the problems associated with conveyances of selected lands in Alaska, the problem concerning navigability decisions remains unresolved. At issue are BLM's navigability decisions, and their effect on hundreds of conveyances made to Native corporations and the State.

The 5-year statute of limitations established by section 901(a) began to run on December 2, 1985. However, the State has not made a final determination as to which decisions or conveyances it wishes to challenge. Thus, the State must either challenge all the conveyances that are subject to the 5-year statute of limitations, or risk the possibility of being precluded from challenging some of the conveyances and decisions.

Extension of the 5-year statute of limitations for one year, as proposed under H.R. 3851, would help to resolve the State's problem, and would also benefit BLM. In this instance, we support extending the statute of limitations for one year. The additional year would be used by the State to select those

conveyances and decisions it wishes to challenge. Presumably, the selected conveyances and decisions will be fewer than the total number of conveyances and decisions which the State could challenge. The resulting decrease in the number of suits that would be filed would also decrease the administrative costs that would be incurred by BLM in defending its navigability decisions. In addition, it is expected that the Federal courts will clarify the definition of navigability during the upcoming year. Finally, in general, we support any measure that would decrease the possibility of litigation. Thus, we recommend the enactment of H.R. 3851.

This concludes my prepared statement. I would be pleased to respond to any questions on this subject.

Senator WALLOP. Thank you, Mr. Parker.

It would strike me, after reading just briefly, that a clear definition of navigability is desperately needed.

For example, in your prepared statement, you refer to it as being the width of three chains or 198 feet. Is that anywhere close? Is that at high water, or is that flood stage?

Mr. PARKER. Yes, sir.

In Alaska that's a little bit difficult to determine because of the kind of terrain and the topography, and there is a lot of surface water. That has been one of the main difficulties in how determinations are made.

Senator WALLOP. It seems as though that would have been one of the things that had been thought out in advance.

Mr. PARKER. The final determination, obviously, is a matter of fact and has to be established by the court. That's the only way that can be done. We do that through our survey program, but it's only an initial determination.

Senator WALLOP. But you see no problems at all with the extension?

Mr. PARKER. No, sir. We think it would be a great help to us.

Senator WALLOP. All right. I thank you very much.

Mr. Smith.

STATEMENT OF P. DANIEL SMITH, DEPUTY ASSISTANT SECRETARY, FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR

Mr. SMITH. It is a pleasure to appear before you today, Mr. Chairman, to discuss Senate Joint Resolution 221 and House Joint Resolution 382. I will submit my prepared statement for the record, Mr. Chairman, and will summarize our major concerns.

We do not object to the enactment of Senate Joint Resolution 221 or House Joint Resolution 382, if amended to meet our concerns.

Congress established Sequoia National Park in 1890. Subsequent acts of Congress in 1901, 1926, 1962, and 1974 have addressed the issue of hydroelectric power generation within the park.

The 1974 House Joint Resolution 180, Public Law 93-522, extended the special-use permit for Southern California Edison Co. to operate Kaweah No. 3 for an additional 10 years. Further, section 4 of that act required the National Park Service to prepare and transmit to the Congress a report on the impact of the operations of Kaweah No. 3 on Sequoia National Park resources. That report was transmitted to the Congress in July 1985.

The results of the report did not indicate sufficient adverse impact by the flumes, canals, and other water conduits within the park to prompt our objection to the relicensing of the Kaweah No. 3 project. But several resource issues of concern were identified.

First, maintenance of a minimum-flow level of the Kaweah River.

Second, control over access and types of equipment used to maintain the infrastructure.

Third, clarification of Southern California Edison Co.'s responsibility for removal of this infrastructure and site restoration in the event of abandonment of this project.

Mr. Chairman, in light of the concerns, we recommend that section 2 of Senate Joint Resolution 221 be amended to specifically authorize the Federal Energy Regulatory Commission [FERC] to issue a 10-year term license, as well as to limit the Secretary of the Interior's permit authority to a concurrent 10-year period.

The FERC license and the Interior permit could be renewed for additional periods of 10 years each. This process will allow periodic administrative and/or congressional review of the resource impact and allow modifications of the conditions of the special-use permit to be developed to assure protection of the park's resources.

The existing language of section 2 of Senate Joint Resolution 221 is that FERC, which we believe has no existing authority to license hydroelectric projects within units of the National Park System, could theoretically issue a license for a period of up to 50 years, thereby exerting administrative pressure on the Secretary to reissue a permit for the operation of the project.

We believe it is appropriate for both FERC and the Secretary to reconsider the issue at the same time, in this case, 10-year intervals, and with adequate resource data available to the agencies and the Congress to make sound resource decisions.

That concludes my summary, Mr. Chairman, and I would be pleased to answer any questions the committee might have.

[The prepared statement of Mr. Smith follows:]

STATEMENT OF P. DANIEL SMITH, DEPUTY ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS. NATIONAL PARKS, AND RESOURCE CONSERVATION, SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES CONCERNING S.J. RES 221 AND H.J. RES. 382, TO AUTHORIZE THE CONTINUED USE OF CERTAIN LANDS WITHIN THE SEQUOIA NATIONAL PARK BY PORTIONS OF AN EXISTING HYDROELECTRIC PROJECT.

JANUARY 30, 1986

It is a pleasure to appear before you today to discuss S.J. Res. 221 and H.J. Res 382, to authorize the continued use of certain lands within the Sequoia National Park by portions of an existing hydroelectric project.

Section 1 of S.J. Res. 221 would authorize the Secretary of the Interior to issue a permit for an existing Southern California Edison Company hydroelectric project, known as Kaweah No. 3. Section 2 provides that the term of the permit shall coincide with the term of existing or future licenses granted by the Federal Energy Regulatory Commission. Section 3 provides that the permit shall prohibit the expansion of Kaweah No. 3 and shall contain other terms and conditions deemed necessary by the Secretary of the Interior for the protection and utilization of Sequoia National Park. On the other hand, H.J. Res. 382 would authorize a permit for a period of ten years with no more than two renewals of the same duration. It would also provide that, prior to the execution of any new permit, it shall lay over before the Senate and House committees for a period of sixty days. Finally, as passed by the House on November 14, 1985, H.J. Res. 382 would provide that the Secretary shall impose terms and

conditions in the permit to ensure proper "management and care" as opposed to the "protection and utilization" of Sequoia National Park.

We do not object to the enactment of S.J. Res. 221 or H.R. Res 382, if amended to meet our concerns, which I will discuss.

In setting aside the land to be known as Sequoia National Park, the Act approved September 25, 1890, provided that the Secretary "shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition." Also, the Secretary "shall provide against the wanton destruction of the fish and game found within said park...." However, in the Act approved February 15, 1901, the Secretary of the Interior was authorized to permit the use of rights of way in various parks, including Sequoia National Park, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telelphone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams and reservoirs. The Act further provided that permission could be revoked by the Secretary in his discretion.

In legislation revising the boundaries in 1926, provision was made that no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other

works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted, shall be granted or made without specific authority of Congress. Therefore, when the original permit expired on March 5, 1962, the Solicitor of the Department of the Interior advised the Secretary that no authority existed under which to issue a permit and that legislation would have to be sought. To remedy this situation, House Joint Resolution 180 was introduced and subsequently enacted to provide specific authority to issue a permit to the Southern California Edison Company (P.L. 88-47; 77 Stat. 70) for the Kaweah No. 3 hydroelectric project in Sequoia National Park. The term of the permit was to expire not later than August 6, 1974. Finally, another House Joint Resolution was signed into law December 14, 1974 (P.L. 93-522; 88 Stat. 1660), to extend the special use permit for an additional ten years but requiring that the National Park Service prepare and transmit to Congress a report on the impact of the operations of the Kaweah No. 3 on the Sequoia National Park. The study required by Section 4 of Public Law 93-522 was transmitted to Congress in July of 1985.

Generally speaking, if we were faced today with the situation of allowing a hydroelectric project within the boundaries of Sequoia National Park, we would oppose it because the Congress has the sole authority to allow such projects in the national parks. However, given the fact that the project has been in operation for about 75 years, there is an historical aspect we must

consider. Our mission, though, is to protect the resources of the national park. Therefore, we welcomed the study of the impacts of Kaweah No. 3 on the park resources required by the 1974 law. While the results of the study did not indicate sufficient adverse impact to prompt our objection to the relicensing of the Kaweah No. 3 project, several issues of concern were raised: First, maintenance of a minimum flow level of the river. Second, control over the access and types of equipment used in maintenance of the facility. And, third, clarification of the responsibility of Southern California Edison Company for the removal of the facilities and site restoration in case of abandonment of Kaweah No. 3.

In light of these concerns, we recommend that section 2 of Senate Joint Resolution 221 be amended to specifically authorize the Federal Energy Regulatory Commission (FERC) to issue a ten-year term license as well as to limit the Secretary's permit to a ten-year period. The permit and license could be renewed for additional periods of ten years each. This ten-year permit would allow periodic review of resource impacts and modifications of the conditions of the permit when necessary to assure protection of the park environment. We would also include provisions to meet our three concerns, which were outlined previously. In addition, we intend to set up a monitoring system to determine baseline changes. While H.J. Res 382 provides for an initial permit of ten years with the potential for two renewals of equivalent duration, we nonetheless believe it would be more

appropriate to limit both the license and permit period to ten years.

The reason we are concerned with the existing language of section 2 of S.J. Res 221 is that currently FERC, which has no existing authority to license hydroelectric projects within the National Park System, could, theoretically, issue a license for a period of up to 50 years, thereby exerting undue pressure on the Secretary to reissue a permit even when such action could or would be detrimental to the resources of the park. We believe it is more appropriate for both FERC and the Secretary to reconsider the situation at the same time in ten years in light of adequate resource data.

While the issue of Kaweah No. 3 is being considered, Mr. Chairman and Members of the Committee, we would like to bring to your attention the fact that there exist four hydroelectric dams and reservoirs in the Mineral King addition of the park. They were constructed between 1903 and 1912 for the Kaweah No. 1 project to provide additional water sources during periods of low flow.

While we have been told by representatives of the Southern California Edison Company that the economic benefits of these facilities are extremely minimal and are of relatively little value in the generation of electricity, we have not studied either the environmental affects or the economics associated with these dams. We intend to prepare an economic and environmental

study to determine whether or not these dams should be relicensed, and a new permit issued. We will share the results of this study with the Committee when it is complete. As we did during the study period on the Kaweah No. 3 project, we intend to work closely with all interested parties.

That concludes my prepared statement, Mr. Chairman. I would be happy to respond to any questions that you or other members of the Committee may have.

Senator WALLOP. How many dams are there?

Mr. SMITH. There are some minor dams—the actual major dam structure is located outside the park. There are four small dams located on four small lakes within the park boundary, and the issue here is actually not anything dealing with power generation or large dam structures, but with the conduits which carry this water down to the actual generation facility which is outside the park boundary.

Senator WALLOP. Are there problems associated with it—its operation today?

Mr. SMITH. I would not say that there are problems associated with it. In fact, there's a very excellent working relationship between the park and Southern California Edison. There certainly are infrastructure problems where there probably is need for certain annual repair to these flumes and conduits, but not the type of major problems you might have if you had a major dam within the park.

Senator WALLOP. But they have been doing that for 75 years.

Mr. SMITH. Yes.

Senator WALLOP. And the park is still popular.

Mr. SMITH. Yes; very much so.

Some people would raise aesthetic concerns and that type of thing, but the campgrounds are located right next to this, and actually it's very much a part of the park. We're even faced with the interesting dilemma, Mr. Chairman, that at such time as the facility would not be economic and we would look to take out some of that infrastructure, it would have to come under the section 106 Historic Preservation Act requirements because it is historic.

So, it's kind of an interesting juxtaposition in that regard.

It is not viewed by the park users as a major problem, but of course it is tied into this major issue of hydroelectric facilities within national parks.

Senator WALLOP. How is that? I mean this is something in a place that has been in existence for 75 years. It does not seem to me that it establishes new precedent.

Mr. SMITH. No; in fact, Senator, I was reviewing my briefing book last night. I was reading the 1963 report from this committee that your former very distinguished chairman, Mr. Jackson, submitted; and the issues are the same. We are not on any new turf here.

The only difference is that we're dealing with the regulatory agency FERC instead of the old Federal Power Commission, and there are really no new issues. Where basically it's a status quo thing, the one concern that we have is the administrative problems that we have in dealing with FERC as a licensing regulatory agency and the situation with permits that the Secretary issues and the fact that Congress, although we haven't put it on this 10-year scheme, has actually been reviewing this project about every 10 years—1973, 1974, and now 1985.

It seems that this is a sensible way to have it looked at to where Congress can certainly give the overview you want of us and also settle some of our problems that we have with FERC who, in licensing these projects within national parks, creates administrative problems for the Secretary of the Interior.

Senator WALLOP. You will forgive me if I think that the public at large, which we ostensibly serve, should not pay the price for the inefficiencies of Government interagency relationships.

Mr. SMITH. That's well taken, Senator.

Senator WALLOP. I just have a hard time thinking that it is their responsibility to put up with our unaccountability. Maybe the thing to do is to work on a relationship between FERC and other agencies, rather than to tie this up. But we will look at the amendments which you suggested. I think you would agree that something should be done now.

Mr. SMITH. Oh, yes; certainly, Senator.

Senator WALLOP. Minimally extending it at least 10 years.

Mr. SMITH. Yes; we have the technicality that the authority for this permit expired December of last year and certainly in that regard we need to move forward on this issue.

Senator WALLOP. All right. Thank you both very much. I appreciate it.

On H.R. 3851, Mr. John W. Katz, director of State/Federal relations and special counsel to the Governor of the State of Alaska.

STATEMENT OF JOHN W. KATZ, DIRECTOR OF STATE/FEDERAL RELATIONS AND SPECIAL COUNSEL TO THE GOVERNOR, STATE OF ALASKA

Mr. KATZ. Mr. Chairman, my name is John Katz. I'm director of State/Federal relations and special counsel to the Governor of Alaska. Before this, I was commissioner of the Alaska Department of Natural Resources.

Senator WALLOP. Mr. Katz, could you just move that microphone a little closer? I have said it before; these are state of the art microphones, but the art of which they're the state is about 1902.

Mr. KATZ. The State of Alaska strongly supports the enactment of H.R. 3851. As you know, this legislation would extend by 1 year the statute of limitations provided in section 901(a) of ANILCA. The bill passed the House by unanimous consent.

We believe that several benefits would accrue from the enactment of this legislation.

First, it would provide the Congress and the parties involved 1 more year to try to develop a comprehensive resolution of the submerged lands question in Alaska. In this regard, discussions have been underway for several months.

Failing such a comprehensive resolution, a 1-year extension would give the courts additional time to consider and rule on several pending lawsuits which will provide definitive guidance on some of the legal principles involved.

Second, enactment of this legislation would avoid the necessity by the State of Alaska to initiate litigation for the sole purpose of satisfying the statute of limitations. As a consequence, scarce public resources would be conserved. Of equal importance, Native corporations, many of which cannot afford to do so, would not be required to defend lawsuits brought by the State.

We believe in addition that conflict and strife within the State of Alaska would be a burden. The State has looked over time at some 150 waterways and water bodies. While we would definitely not

bring litigation with respect to all of those areas, we would be compelled to bring litigation with respect to quite a few.

Originally we projected that litigation would have to be commenced in late January. Now the Attorney General advises us that the first lawsuits would be brought some time on or about February 24 of this year.

It should also be noted that none of the groups involved appear to oppose the 1-year statute of limitations extension. While the State of Alaska strongly supports this legislation, we do view it as a stopgap measure. Rather, we favor the enactment of comprehensive legislation.

Some 2 years ago, representatives of the State, the Alaska Federation of Natives, and the Interior Department got together and developed a series of recommendations. These recommendations were subsequently involved in legislation which was introduced by Senator Murkowski in the first session of this Congress.

That legislation would accomplish two principal purposes. First, it would permanently repeal the statute of limitations. While it is true that the State of Alaska supported the statute of limitations in 1979 and 1980, further legal research and experience proves that this was a mistake.

It is for this reason that we have initiated litigation in Alaska challenging the statute of limitations on the grounds that it violates the equal footing doctrine.

From a policy point of view, the statute was intended to bring certainty to the submerged lands question in Alaska. In fact, it has had the exact opposite effect. It is compelling the initiation of litigation for the sole purpose of satisfying its dictates, rather than because there are important natural resources conflicts involved.

We would much prefer to duplicate the prototype of the lower 48 States where navigability litigation has been spread out over decades and is brought only when important resource issues are involved.

The second major feature of the comprehensive approach is that it would give legislative sanction to the application of the BLM Survey Manual to submerged lands in Alaska.

Prior to 1983, with respect to both State and Native land selections, the Interior Department charged the State and the Corporations against their entitlement for nonnavigable submerged lands acreage above 3 chains wide and above 50 acres in size with respect to lakes.

Secretary Watt changed this policy in 1983, but the policy is currently under attack in the courts. We believe that legislative sanction would be extremely helpful in these circumstances.

It's important to note in this regard that what the State and the Natives are asking for is equality between the treatment of their selections on the one hand and the treatment of State selections in the western public lands States and individual public land entries on the other. The legislative approval, the approach that we have adopted, would assure uniformity throughout the country.

Second, we believe that the natural resource impacts of the comprehensive legislation would be relatively small. We estimate that in the case of the State, about 460,000 additional acres would be involved, and with respect to the Natives about 270,000 acres.

Those figures were derived through studies that have been exposed to public review and comment, and thus far in our judgment there has been no credible attack either on the methodology or on the ultimate numbers.

Mr. Chairman, we very much appreciate your willingness to hold this hearing on legislation that is very important to the State of Alaska and in view of the imminence of the statute of limitations period, we respectfully urge the committee to act promptly.

Thank you very much.

[The prepared statement of Mr. Katz follows:]

STATEMENT OF JOHN W. KATZ,
DIRECTOR OF STATE/FEDERAL RELATIONS AND
SPECIAL COUNSEL TO THE GOVERNOR OF ALASKA,
BEFORE THE SENATE SUBCOMMITTEE ON PUBLIC LANDS,
RESERVED WATER AND RESOURCE CONSERVATION
OVERSIGHT HEARING ON SUBMERGED LANDS IN ALASKA

Mr. Chairman and Members of the Subcommittee:

My name is John W. Katz, Director of State/Federal Relations and Special Counsel to Governor Bill Sheffield of Alaska. Before this, I was Commissioner of the Alaska Department of Natural Resources. We appreciate this opportunity to testify on the submerged lands issue which is of such great significance to the State and Alaska Native corporations.

The State of Alaska strongly supports the enactment of H.R.3851, which passed the House of Representatives by unanimous consent on December 12, 1985. This legislation would extend by one year the statute of limitations provided in Section 901(a) of the Alaska National Interest Lands Conservation Act (ANILCA).

Pursuant to applicable law, including the Submerged Land Act and the Alaska Statehood Act, ownership of the beds of most navigable rivers and lakes in Alaska automatically vested in the State of Alaska on the date of statehood. However, because of disputes over the proper criteria for determining navigability, the Department of the Interior has conveyed hundreds of rivers and lakes claimed by the State to Native

corporations, and has charged the submerged lands against their acreage entitlements under ANCSA. The same situation exists for conveyances to the State under the Alaska Statehood Act.

Section 901 of ANILCA was an attempt to guarantee that Native corporations would not lose a portion of their land entitlement under ANCSA as a result of judicial findings of navigability. That provision established a time period after which the State of Alaska could no longer assert State title to riverbeds and lake bottoms conveyed to Native corporations.

Because of that time limitation, the State of Alaska must begin to file lawsuits in 1986 to assert its claims to navigable waterbodies that have been conveyed to Native corporations, or lose the right to claim title. At this time, there are approximately 150 waterbodies that are under evaluation by the State for possible institution of navigability litigation this year. The State must bring its first lawsuit on or before February 24, 1986, unless Congressional action is taken to remove or extend the existing limitations period.

Unfortunately, navigability litigation would perpetuate, instead of end, the conflicts and uncertainties regarding acreage chargeability and ownership of submerged lands in

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Alaska. The problem is aggravated by the relatively slow progress of ongoing efforts to establish judicial criteria for navigability determinations in the State.

It is true that the State and many others originally supported the language in Section 901. However, experience and further legal research have shown that the proponents of this approach were in error. As a result, the State has challenged the constitutionality of the statute of limitations in Section 901 on the ground that this subsection violates the equal footing doctrine.

Another significant and related issue concerning waterways and waterbodies in Alaska arose out of the initial failure of DOI to use the rules of survey contained in the Manual of Instructions for the Survey of the Public Lands of the United States (1973) when surveying and conveying public lands in the State. I would like to emphasize that these standard rules of survey are used for conveyances to all other states and public land entrants.

The rules require that only uplands be surveyed. Lakes 50 acres or larger and rivers and streams 198 feet in width or wider are segregated from the public lands. The recipients of conveyances from the federal government are charged only for the amount of public land identified by the properly

conducted survey. Riverbeds and lake bottoms that meet the criteria set out above are not included in that figure.

Except for rivers and lakes smaller than the administrative criteria, navigability determinations do not affect the amount of land conveyed in fulfillment of acreage entitlements. Again, these rules have been consistently applied to states other than Alaska. There is no reason to believe that Congress intended that a different survey and conveyance procedure apply to conveyances to the State of Alaska or Alaska Natives.

Beginning in 1981, the State, the Natives, and the Department of the Interior began discussions on alternative ways of solving the problems resulting from Section 901 and the survey problem just described. In 1983, the three parties agreed to a solution: the statute of limitations would be repealed. In addition, the traditional procedures for segregating waterbodies set out in the BLM survey manual would be applied in Alaska as elsewhere.

On December 5, 1983, the Interior Department published a notice in the Federal Register announcing its decision to use the BLM survey manual rules in Alaska. The Sierra Club and the Wilderness Society filed suit in the U.S. District Court for D.C., challenging the validity of that action and the process used to reach the decision. They contended

that, even though there are no specific provisions in applicable law, Congress intended that special rules be applied to conveyances in Alaska. This case is still pending.

In the meantime, legislation has been proposed that contains both a recognition of the administrative decision to follow the rules found in the BLM survey manual, and repeal of the statute of limitations. Use of the standard survey rules means that determinations of navigability or non-navigability should have little or no effect on the Native corporations' acreage entitlement. This change in practice also means that the statute of limitations may now be repealed without harm to Native interests. The proposed legislation is conceptually similar to Section 918 of H.R.39, as it passed the U.S. House in 1979. That provision was replaced in the Senate in favor of Section 901.

If the Section 901 statute of limitations is not repealed, an enormous and unnecessary burden of litigation would fall on the State and the Natives. To prevent that result, the proposed solution would establish a situation comparable to that found in other states, where litigation occurs only when specific interests, such as oil and gas rights, are involved. Since the artificial stimulus of an unnecessary statute of limitations would be removed, litigation

involving only real disputes would be spread over many years.

The State, the BLM, and the Natives have worked for the past year to arrive at an accurate estimate of the amount of acreage which would be affected by the prospective applicaton of the Department of the Interior's 1983 decision to follow the standard rules of survey. That estimate indicates that a maximum of about 460,000 acres of uplands will be conveyed into State ownership, and 270,000 acres into Native ownership, as a result of using the standard rules of survey for determining acreage chargeability. These estimates are based on a detailed analysis of the various physiographic regions of Alaska. All interested parties have been presented with the opportunity to examine and comment on the rationale for these figures. No alternative figures or methodologies have been presented. Because there are few State inholdings in conservation system units (CSU's), the additional State conveyances will generally not affect CSU's. Although additional Native inholdings within CSU's would occur, many of these would be created in any event as a result of successful assertions of navigability by the State.

While the State has a strong preference for prompt passage of comprehensive legislation, we recognize that this resolution may not be forthcoming before the end of

February, 1986, when the State will commence bringing lawsuits to assert and preserve our claims to submerged lands. These lawsuits would cause unnecessary conflicts between the State and Native corporations.

As an alternative, we advocate an extension of the Section 901 statute of limitations for one year. This would give additional time to develop a resolution of the issue, either by decision of the two pending court cases, or an agreed solution among the various parties involved. As a further consequence, the State and Native corporations would be relieved of the expensive and undesired task of prosecuting or defending many lawsuits which might otherwise never occur. No one has yet identified any adverse impacts on the parties involved which would result from the enactment of this stopgap legislation.

Thank you for this opportunity to appear here today. I would be pleased to answer any questions which you might have.

Senator WALLOP. Mr. Katz, given the fact that the BLM has embraced it and we know of no controversy, I would think that we could do that. The question really recurs on the major underlying legislation which Senator Murkowski has introduced.

Mr. KATZ. I agree with you, Mr. Chairman. It is our hope that once we can clear the decks of the 1-year extension, that we can fairly quickly thereafter come back to the Congress and enter into a dialogue with respect to the enactment of a comprehensive approach.

Senator WALLOP. I expect we can go into the details of that when it comes up for hearing.

Mr. KATZ. Yes, sir.

Senator WALLOP. So we will do as quickly as we can the committee's work on this, and I assume that if it remains an uncontroversial issue, there would be no reason why it could not be considered.

Thank you very much.

Mr. KATZ. Thank you, sir.

Senator WALLOP. Mr. Don Mitchell, counsel to the Alaska Federation of Natives and the Honorable Lloyd Meeds of the Calista Corp.

STATEMENT OF JANIE LEASK, PRESIDENT, ALASKA FEDERATION OF NATIVES AS PRESENTED BY DON MITCHELL, COUNSEL

Mr. MITCHELL. Mr. Chairman, members of the committee, my name is Donald Mitchell. I am counsel to the Alaska Federation of Natives.

Janie Leask, the president of the Alaska Federation of Natives, had hoped to testify personally this morning but was unable to leave Alaska. I have submitted her written testimony for the record, and I would hope that it would be accepted and printed in full in the hearing record.

Senator WALLOP. It will be, of course.

Mr. MITCHELL. And I'll just briefly try and summarize her remarks.

The Alaska Federation of Natives is the statewide Native organization that is composed of the 12 regional corporations that were established by the Native Claims Settlement Act, 12 of the regional nonprofit corporations that take care of the health and social service needs of Alaska Natives, and also 12 representatives from village corporations and other village organizations all around Alaska.

I think AFN has appeared before this Congress many times speaking with the voice of all of the Native people about these very important issues.

Mr. Chairman, on behalf of the AFN we would like to testify very strongly in support of the immediate enactment of H.R. 3851. As Mr. Katz has previously characterized it, it is an important stopgap measure to keep village corporations from having to spend finite resources defending title to lands that were given to them in settlement of their claims.

But I cannot emphasize too strongly the interim nature of this solution and to indicate to you the box that the Native community has been put in about this complex problem.

A lot of people think that the Claims Act was some kind of act of congressional largesse, but what people forget is that the Native community gave up an awful, awful lot. They gave up Prudhoe Bay, Alaska. They gave up lands that Mr. Katz and the State of Alaska have been using to support all State citizens up there. And most importantly, they also gave up lands that have millions and millions of acres that have become national parks and wildlife refuges for the benefit of all American people.

In exchange, what they got was the right to retain ownership of 44 million of those 375 million acres.

In 1971, you told the Bureau of Land Management to convey that land "immediately." It is now 1986 and we are still before you, arguing about complex internal BLM procedures for fulfilling that congressional direction.

Now, what happened was that there is a complex problem about the relationship of navigable waterway ownership and public land conveyances on all public lands in the West. I am sure members of this committee are as familiar with the problem in their own States as we are in Alaska.

The BLM has come up with a procedure that they've developed over 200 years of practice to deal with these conflicts. It's a simple procedure; it's time-tested; it's set out in the internal BLM Manual of Survey.

In 1973, for reasons that we don't have to go through in this hearing, the BLM and the Department arbitrarily determined that somehow you, the Congress, had intended that that time-tested procedure not be applied with respect to conveyance of public lands to the Native community.

There was no basis in fact for that. We have continually protested to the Department of the Interior about it for years and years and years, as millions of dollars have been spent by the Native community to defend title to their land.

Finally, we started working during the Alaska lands process to arrive at a political settlement because it was the most economically efficient way to do it. We worked in good faith for half a decade with the various parties to try and work out an arrangement.

That has not proved satisfactory. Litigation that we have not initiated has started all over the map again by the various protagonists on each side. Every time somebody does that, the Native community has got to become involved to defend their interest. That doesn't happen for free. They've got to take money that you paid them in settlement of their claims to pay guys like me to protect lands that they have a right to own in peace.

It's a terrible situation. And we went to the Department one last time to say, could you please review the initial decision way back in 1973 as to why the normal procedure that we all know will work could not be used to solve this problem?

The Solicitor's Office looked at it; the Bureau looked at it. There was a full above-board policy review, and the Department said, hey, maybe there was a mistake made.

Now, Mr. Chairman, you initially said that you hoped that the Department of the Interior, the State of Alaska, the Native community, could work during this interim to develop a solution. We have done that. We did that 2 years ago. As a result of that policy

review, Secretary Watt ordered that the policy for conveying these lands be changed and it not be done in any new way, but that it would be done in a way that is done in your State and the way that is done in the State of Nevada and the way that is done in the State of California.

It was not that big a deal, but it solved a very difficult problem for us.

Now, that was a solution that was initially suggested by the Assistant Secretary of Land and Water Resources back when Secretary Andrus was Secretary. You know, there has been talk that this is one of Secretary's Watt's ongoing campaigns to convey greater numbers of Federal lands out of public ownership. This simply is not true.

I mean all responsible people that have had responsibility for the actual conveyance of these lands, have looked at the matter and they have come up with a solution that is consistent with what Secretary Watt ordered the change in policy to be.

Well, that solution which would have solved this whole matter was immediately challenged by the Wilderness Society and the Sierra Club. Now, the Native community has worked in close quarters with both those organizations over the years and reasonable minds can differ, and we will continue to work closely with them. But there are times when people are simply wrong.

And when we have a hearing on S. 485, which I hope comes fairly soon in this session of Congress, we'll present all of the background of this issue to you. But I will represent to you the opinion of the Sierra Club and Wilderness Society, although it's not overly fair to speak for them. They have articulated on the House side, that their sole objection to solving this problem in the way that Secretary Watt solved it is that it will result in additional acres of land being conveyed to Native groups that are located within wildlife refuges and in parks, and that somehow that in and of itself is wrong.

Well, I would like to respectfully remind the committee when it's dealing with this issue, that if you review the record of the Alaska National Interest Lands Conservation Act, it was those very villages, it was those very Native people that came to this Congress and testified and requested that the lands surrounding theirs be designated as wildlife refuges and parks, because more than any other group of Americans, they had the most to lose if those fish and wildlife resources were not adequately protected for future generations.

And now, because they have requested that that be done and participated enthusiastically in doing it, somehow that means that those lands have become so important that they are not to be allowed to obtain the lands that they were allowed to retain so that those lands could be designated as national interest lands.

Mr. Chairman, this is not the time to engage in a full-blown analysis of S. 485, but I want to again emphasize that we do view this as an interim solution; that this is not the Native community's fault; that with the passing of every day, more and more and more of very finite financial and human resources have got to go into this issue, and the Native community demands that some social

justice and some closure be brought to this issue, hopefully in this session of Congress.

So, Mr. Chairman, again we appreciate the early attention you're giving to passage of H.R. 3851, but we would like to again respectfully, like Mr. Katz, bring this matter to the committee's attention and indicate that there is substantial agreement as to what should be done about this very difficult issue.

What we would hope is that you would deal with this on its merit, get not just the Native community, but get every single interest group that has an interest in this matter, get us up here at this table and let us each give you our pitch as to how we see the public policy issues that have divided us and have this committee make the call. And if this committee believes that we're right and that Secretary Watt's decision was a correct public policy solution, then we would respectfully urge enactment of S. 485. And if you believe to the contrary, then obviously S. 485 should not be enacted into law.

But we certainly need some attention given to this issue, and so thank you again, Mr. Chairman. We do appreciate your early attention to H.R. 3851.

[The prepared statement of Ms. Leask follows:]

TESTIMONY

OF

JANIE LEASK

PRESIDENT OF THE

ALASKA FEDERATION OF NATIVES

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

OF THE

UNITED STATES SENATE

JANUARY 30, 1986

Mr. Chairman, members of the committee, my name is Janie Leask. I am president of the Alaska Federation of Natives (AFN). The AFN board of directors is composed of a representative of each of the thirteen regional corporations established pursuant to the Alaska Native Claims Settlement Act (ANCSA), a representative of each of the twelve Native regional nonprofit associations which provide health, housing, and related services to Alaska Natives in each geographic region described in section 7(a) of ANCSA, and twelve represenatives of village corporations, and Indian Reorganization Act and traditional Native village councils. AFN's member organizations represent the totality of the over 60,000 Native people living in Alaska. On behalf of AFN I would like to express our appreciation for the opportunity to testify today in support of H.R. 3851.

However, H.R. 3851 is an interim solution to a thirteen year old problem. Delaying for another year the necessity for ANCSA corporations to spend their shareholders' finite resources to defend title to submerged lands conveyed in partial settlement of Native aboriginal land claims will provide Congress time to enact a comprehensive solution to the submerged lands problem. A problem, Mr. Chairman, which Alaska Natives had no hand in creating.

Section 6(m) of the Alaska Statehood Act applies the Submerged Lands Act in Alaska. Consequently, the moment Alaska entered the federal union, by operation of law the new state was conveyed title to all "lands beneath navigable waters" which had

not been previously withdrawn.

Unfortunately, whether a particular lake or river was or was not "navigable" at the time Alaska entered the union is a question of fact which can be decided only by a United States District Court. Until a federal court has determined that a particular lake or river is or is not navigable, neither the Bureau of Land Management (BLM) nor the State of Alaska knows conclusively whether the federal or the state government owns the bed. However, adjudicating the ownership of each of the tens of thousands of lakes and rivers in Alaska would be an outrageously expensive and unrealistically time consuming manner in which to manage the public lands. To avoid this result, over the past two hundred years the BLM has developed a procedure for surveying and conveying the public lands which satisfactorily resolves the uncertainty as to which government holds title to the bed of which submerged lands.

At the time ANCSA was enacted in 1971, this procedure was set forth in the 1947 edition of the BLM Manual of Surveying Instructions, which, with one significant exception, continues to control the BLM survey and conveyance process in the present day. Sections 231 and 232 of the manual require BLM to "meander" all lakes and rivers which it determines administratively to be navigable plus lakes 25 acres or larger in size and rivers three chains or more wide. Section 226 of the manual then requires BLM to segregate land within meanderlines from the survey. When an entryman is conveyed land abutting or surrounding a lake or river

which has been meandered, BLM satisfies the entryman's acreage entitlement by conveying him uplands outside the meanderlines. Land under and out to the median line of the meandered lake or river is conveyed to the entryman pursuant to the common law doctrine of riparian ownership and the land is not charged against the entryman's acreage entitlement.

In 1973 BLM published a new edition of the manual which requires the BLM to meander lakes 50 acres, rather than 25 acres, and larger in size.

Because the lands within meanderlines were not charged against the entryman's acreage entitlement, if a court later determines that a lake or river overlying the land is navigable and that title to the land passed to the state at the time it entered the union, the entryman will not lose title to the number of acres of public land to which he is entitled to be conveyed. On the other hand, since land underlying the smaller lakes and narrower rivers which were not meandered is charged against the entryman's acreage entitlement, if a court later determines that a small lake or narrow river overlying this land is navigable, the determination does result in a reduction of the entryman's entitlement. However, since the likelihood of the larger water bodies being navigable is large and the likelihood of the smaller waterbodies being navigable is small, this system adequately protects the legitimate interests of both the entryman and the state in protecting their title to submerged lands.

Unfortunately, the Department of the Interior inexplicably

and unlawfully refused to apply this time-tested and relatively simple procedure to the survey and conveyance of public lands to ANCSA corporations. Instead, on May 30, 1973, the Department promulgated 43 C.F.R. 2650.5-1(b).

This regulation requires the BLM to convey an ANCSA corporation title to the land beneath lakes and rivers within the corporation's selection area which it determines is nonnavigable, except that the corporation need not accept conveyance of land beneath a lake or river which is at least one-half section or more larger in size. Implementation of this regulation has resulted in the conveyance to ANCSA corporations of fewer acres of public lands above the mean high water line than the corporations would have been conveyed if submerged lands had been surveyed and pursuant to the procedure set forth in the manual. It has also reduced the total number of acres of public land which will be conveyed in settlement of Native aboriginal land claims.

If a federal court determines that a BLM determination that a particular lake or river overlying land conveyed to an ANCSA corporation is nonnavigable is incorrect, then the Department of the Interior did not own the land the BLM conveyed, and the corporation's acreage entitlement will have been reduced through no fault of its own.

The Department of the Interior justified its refusal to survey and convey submerged lands to ANCSA corporations in the manner set forth in the manual on the sole ground that the

following sentence of section 13(a) of ANCSA mandates that result:

> No ground survey or monumentation will be required along meanderable water boundaries.

This tortured construction of ANCSA is without any rational basis of support. The sentence was inserted in section 13 by the ANCSA conference committee. The sentence alleviates the necessity of conducting expensive and time-consuming ground surveys of the myriad lakes and rivers located within areas withdrawn for selection by ANCSA corporations. It does not state that the BLM Division of Cadastral Survey is not required to follow its normal survey procedures when surveying lands selected by ANCSA corporations, including procedures which require lakes and rivers of appropriate size to be meandered using photogrammetric and other electronic means of survey. As the Bristol Bay Native Corporation wrote the Department of the Interior in 1978, if the Department of the Interior's interpretation of the intent of Congress embodied in the previously cited sentence is correct:

> It would mean that the Congress, as a kind of afterthought in Conference, with no hearings, and no statement from any of the Natives whose rights would be affected, without a single word of explanation and in a section not dealing with acreage entitlement, by a single sentence dealing with the technology of conducting surveys, reduced, by a large but unknown amount, the acreage entitlements that were otherwise provided in the bill, in exchange for the extinguishment of the aboriginal claims of the Alaska Natives.

AFN and its member corporations protested 43 C.F.R. 2650.1-5(b) from almost the moment it was promulgated. However, rather

than continuing the debate with the Department of the Interior as to the validity of 43 C.F.R. 2650.1-5(b), in 1978 AFN requested the Department of the Interior to work with AFN to develop a statute resolving the dispute which both parties could be request the Congress to insert in the Alaska National Interest Lands Conservation Act (ANILCA) whose enactment was then under consideration.

During the course of the internal policy review which preceded those negotiations then Assistant Secretary for Land and Water Resources Guy Martin recommended to Secretary of the Interior Cecil Andrus that the most appropriate way to resolve the issue was simply to instruct BLM to convey public land to ANCSA corporations pursuant to the normal survey and conveyance procedures set forth in the BLM Manual of Surveying Instructions. However, Secretary Martin's suggestion was opposed by other persons within the Department who, unlike Secretary Martin, had no responsibility for the conveyance of public lands. Although AFN supported Assistant Secretary Martin's approach, it reluctantly agreed to support a modified version of the survey and conveyance procedure set forth in the manual.

That approach was adopted by the U.S. House of Representatives as section 918 of the version of ANILCA which it passed in 1979. Had it been enacted into law, section 918 would have instructed BLM to survey and convey public land to ANCSA corporations in the manner set forth in the BLM Manual of Surveying Instructions, except that the size of lakes required to

be meandered would have been raised from 50 acres to 160 acres.

Unfortunately, the U.S. Senate declined to adopt section 918. Instead, the Senate inserted what is now section 901 of ANILCA into its version of ANILCA which was ultimately enacted into law.

Section 901(a) establishes a five and seven year statute of limitiations on the State of Alaska's ability to challenge a BLM determination that a lake or river overlying land conveyed to an ANCSA corporation is nonnavigable. Although this approach was initially supported, and indeed suggested, by the State of Alaska, in November 1981 the State filed a lawsuit in the United States District Court in Anchorage which alleges that section 901 is unconstitutional because it violates the Equal Footing Doctrine. The lawsuit is still pending. Whether the State is right or wrong with respect to the merits of its claim, the lawsuit further confuses an already complex issue, guarantees more years of uncertainty, and has forced AFN's member corporations to spend significant sums of money to intervene in the litigation to protect the integrity of the ANCSA land entitlement.

Subsequent to the filing of the State's lawsuit, AFN again requested the Department of the Interior to re-evaluate its decision that section 13(a) of ANCSA mandates that the procedure set forth in 43 C.F.R. 2650.1-5(b), rather than the procedure set forth in the BLM Manual of Surveying Instructions, be used to survey and convey public lands to ANCSA corporations. The

Department granted the request and began the review in the summer of 1983. Both BLM and the Office of the Solicitor participated in the review. As a result of the review, the Department concluded, as AFN and its member corporations had been arguing for the previous eleven years, that section 13(a) does not embody an intent of Congress that public lands be surveyed and conveyed to ANCSA corporations pursuant to a procedure different than the procedure set forth in the BLM Manual of Surveying Instructions. Consequently, on December 5, 1983, Assistant Secretary of the Interior Gary E. Carruthers published a notice in the Federal Register announcing the waiver of 43 C.F.R. 2650.1-5(b) and the Department's intent to meander lakes and rivers, and convey public lands to ANCSA corporations and the State of Alaska pursuant to the procedures set forth in the manual.

Because the December 5, 1983, decision eliminates any further need for the section 901(a) statute of limitations, AFN, the State of Alaska and the Department of the Interior jointly developed an amendment to section 901(a) which, when enacted into law, will repeal the statute of limitations and substitute in its place an affirmation that the December 5, 1983, decision correctly reflectes the intent of Congress embodied in section 13(a) of ANCSA. At that time, AFN fully briefed the Wilderness Society, the Sierra Club and other interested members of the Alaska Coalition about the new amendment. AFN emphasized that with the exception of returning the size of lakes to be meandered from 160 acres to 50 acres, the proposed amendment was

substantiaively identical to the section 918 approach which had been included in the version of ANILCA passed by the House which the Alaska Coalition had supported in 1979.

To no avail. On June 14, 1983, the Wilderness Society and the Sierra Club filed a lawsuit in the United States District Court in the District of Columbia challenging the December 5, 1983, decision on both procedural and substantive grounds. At its core, the lawsuit argues that regardless of the merits of AFN's arguments or the injustice which AFN and its member corporations have spent thirteen years working to alleviate, the December 5, 1983, decision is unacceptable to the Wilderness Society and the Sierra Club because it admittedly will result in the conveyance of more acres of uplands to ANCSA corporations and out of federal ownership than would have been conveyed pursuant to 43 C.F.R. 2650.1-5(b). AFN has intervened as a party to this litigation and cross-motions for summary judgment have been briefed, argued and are awaiting decision.

AFN and its member corporations deeply regret the Wilderness Society's and the Sierra Club's preciptitous action. Their view that the December 5, 1983, decision is inconsistent with section 13(a) of ANCSA is simply wrong.

But aside from the pall the lawsuit has cast over the submerged land conveyance process and the expense of litigation which ANCSA corporations can ill afford, there is a third, potentially more destructive, aspect of the Wilderness Society and Sierra Club lawsuit which transcends the merits of the

plaintiffs' claims - the damage the lawsuit is doing to the long term relationship of trust and understanding which must excist between the Native community and the environmental community if the implementation of ANILCA is to be a success.

ANCSA corporations own 27 million acres of land within the boundaries of national parks and wildlife refuges. They own even more land immediately outside the boundaries of parks and refuges. Whether ANCSA corporations are conveyed additional acres of uplands within parks and refuges as a result of the decision being challenged in the lawsuit is irrevelant to protecting the plaintiffs' version of the national interest. Whether park and refuge values are protected in the years ahead is not dependent upon which landowner owns which particular tracts of land. The ANCSA acreage entitlement is simply too large. Rather, the protection of park and refuge values will only be assured if all landowners work cooperatively to minimize adverse affects on park and refuge lands.

But trust is an essential element of longterm cooperative management. And, regrettably, the Wilderness Society and Sierra Club lawsuit has seriously eroded the trust between the the Native community and the environmental community which had heretofore been carefully nutured by both groups.

Mr. Chairman, the enactment of H.R. 3851 will alleviate the necessity for the State of Alaska to file, and ANCSA corporations to waste finite shareholder resources to defend, lawsuits during 1986 challenging ANCSA corporation title to lands conveyed in

settlement of Native aboriginal land claims. But H.R. 3851 is a stopgap - not a solution.

Last February Senator Murkowski introduced S. 485, the bill developed by AFN, the State of Alaska, and the Department of the Interior to repeal the section 901(a) statute of limitations and affirm the December 5, 1983, decision to survey and convey public lands to ANCSA corporations pursuant to procedures set forth in the BLM Manual of Surveying Instructions. That bill is now pending before this committee. If S. 485 is enacted into law, both the State of Alaska's and the Wilderness Society's and the Sierra Club's lawsuits will be rendered moot, the submerged lands conveyance controversy will end, and the Alaska Native people who have been forced to spend millions of dollars over the past fifteen years to defend their land settlement will receive a semblence of the justice to which they have long been entitled.

Consequently, Mr. Chairman, on behalf of AFN and its member organizations, I would respectfully request that S. 485 be reported by this committee with a recommendation to the U.S. Senate that it be expeditiously enacted into law.

Thank you.

Senator WALLOP. All right, Mr. Mitchell, thank you for that testimony and that counsel on Senator Murkowski's bill. But I would urge you, having seen enough Congresses now in my day, especially in election years, not to count on us being able to get that done, however rational and reasonable it may be.

We can get it done, but we may not. That is just one of the things that I know to be the case. It is not a question of hesitancy on my part. It is just an assessment of what happens around here sometimes. If there is one sour note being sung about a year like this, it is that they seem to be able to stop us from doing the will of Congress, even were it to be a will that would come down on your side.

I will admit to you that we will try to achieve what you wish but I guess the counsel of practical people is that it is best to proceed as rapidly as possible with the time that the extension affords.

Mr. MITCHELL. Mr. Chairman, I appreciate that. We are fully aware of the schedule of Congress and of the difficulty of the Congress dealing with issues that are very important to small groups of people. But if this gets hung up in the normal congressional process, we realize that——

Senator WALLOP. The problem is this. I will just be very honest about it. From watching the Alaska Lands bill and other legislation go through, it seems you all are a long ways away and there is a whole lot of emotion, justifiable emotion, attached to your State.

But it becomes a nice, comfortable throwaway vote by which people can qualify as environmentalists for the rest of the year. It is not a fair thing. I am not saying it is a fair thing, but it is one of the frustrations of dealing responsibly with issues such as those which you have raised.

The Native settlements ought to be resolved. I felt badly about it when we passed the Alaska bill because I didn't think they were going to be settled, and I thought probably we had created at least as much complexity as we resolved problems.

I hope that is not what happens, but I have seen it happen before, and somebody just labels it as an environmental vote and the logic of other positions simply is not considered. Maybe we can get it by, and I would hope so. I am not even saying that I see logic in your position because we have not had a hearing on the bill. I am not suggesting there is no logic assigned to it, but I have seen that happen before and it is too bad.

Mr. Meeds.

STATEMENT OF LLOYD MEEDS, COUNSEL, CALISTA CORP.

Mr. MEEDS. Thank you very much, Mr. Chairman. I am Lloyd Meeds, a partner in the firm of Preston, Ferguson, Ellis & Pullman and Washington, DC counsel for the Calista Corp. which is the second-largest regional corporation of which Mr. Mitchell spoke, and occupies generally the delta area of the Yukon Cuskoquim area.

We appreciate being asked and invited to testify because this is a matter of particular significance to the Calista region.

I ask consent, Mr. Chairman, that the remarks of Nelson Angapak, president of the Calista region, be inserted in the record.

Senator WALLOP. I will do that on one condition, and that is that you pronounce his name once again for me.

Mr. MEEDS. It is spelled and looks like Angapak, but it is pronounced Angapak, A-n-a-g-a-p-a-k. And the Calista region looks like Calista, but it is pronounced Chelista.

Senator WALLOP. All right. I will put the statement in the record.

Mr. MEEDS. Thank you very much, Mr. Chairman. I also want to point out that without question, this issue of submerged lands is more important to the 56 Native villages in the Yukon Cuskoquim area than any other region of Alaska, since every one of them is situated either on tidal or on inland water bodies, and the submerged lands issue is an issue in every single one of them.

I also want to point out, Mr. Chairman, that we come here in strong support of the 1-year extension for the contents of H.R. 3851. We feel that not to have it, or that is to say, the situation in the absence of this legislation will put the State and Native groups, and again these villages of which I speak, most of which are extremely impoverished, to substantial legal cost to either begin or to defend these suits which would be necessary.

I think also it raises apprehensions and concern between the State and Natives which need not be raised. And finally, it serves no legitimate and lasting purpose, so long as there is an opportunity to resolve this thing either legislatively or by agreement. And I think that potential still exists.

So, this support for the 1-year extension is strong. I would just like to raise the caveat that we earnestly hope that this 1 year will be used in a responsible effort by all of the parties to resolve the issue so that it doesn't become the first in a long line of suspensions or extensions which people will be asking this body to institute. I think that would be a very bad precedent.

I, like the Senator from Wyoming, say that the underlying body of law is the principal question. I would like very briefly to point out one problem with that legislation.

From the outset of the negotiations which led up to the adoption by the Secretary of the Interior, Secretary Watt, of the BLM Manual Survey, it was understood and agreed that when the legislation was introduced on this issue, that that legislation would have a retroactive effect. That is to say that for all of those conveyances made prior to the new BLM Manual Survey, there would be resurveys, and the lands which would be available to the State and to the Natives as additional lands would be made available.

Now, that agreement and understanding are carried into effect insofar as the State of Alaska is concerned, by the agreement between the State and the BLM which is a part of the legislation. Unfortunately, through an oversight on our part, that is not a part of the legislation insofar as the Natives, are concerned. So there is no retroactive effect in the bill right now insofar as Alaska Natives are concerned.

Senator WALLOP. Can I make a suggestion to you, then, that you work with Senator Stevens and Senator Murkowski to introduce a bill with that in it, so that we do not have the problem of trying to insert that into a piece of legislation. We can defend its presence easier than we can open it up.

Mr. MEEDS. Right. We certainly intend to work very closely with them. We are not suggesting, sir, that that change be made now or before the passage of this 1-year extension.

We understand that it's impossible. We would just ask that the change be made prior to the matter emerging from the subcommittee, and you are absolutely right.

Senator WALLOP. I again suggest to you that a new bill be introduced and that that would be the vehicle upon which a hearing should be held.

Mr. MEEDS. We will take your advice on that.

Without this change, of course, the legislation is a hollow shell to the Alaska Natives because in our own region, for instance, 90 percent of the village lands already would be either by interim conveyance or conveyance, past the operational effect with the 1983 act. So it's rather meaningless.

I don't anticipate any major problem with that. I am sure Senator Murkowski's staff has already told me they recognize it. I know of no disagreement that that really was the understanding and the agreement, and I don't anticipate it will be difficult. So we hope that that can be done.

Senator WALLOP. But we have a variety of Alaskan experts that sit upon this committee. And I just suggest to you that it is a whole lot easier to hold hearings on something that is there than it is to insert something that is not there.

Mr. MEEDS. We thank you for your suggestion. It's very good. And we will be working to achieve that.

I thank you very much for allowing us to testify.

Senator WALLOP. Thank you both very much. I appreciate it.

[The prepared statement of Mr. Angapak follows:]

TESTIMONY OF NELSON ANGAPAK,
PRESIDENT OF CALISTA CORPORATION,
BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS,
RESERVED WATER AND RESOURCE CONSERVATION OF
THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
JANUARY 30, 1986

MR. CHAIRMAN, My name is Nelson Angapak. I am President of Calista Corporation, a native regional corporation created under the Alaskan Native Lands Claims Settlement Act of 1971.

Mr. Chairman, at the outset please allow me to express my thanks at being invited to testify before this subcommittee on the matter of submerged lands. This is an issue of utmost importance to the Calista Corporation and to the 56 native villages located in the Calista region.

Calista is the second largest Alaska native regional corporation, both in terms of geography and native population. All of the Calista Region Villages are located along coastal or inland water bodies -- All of our village corporations have selected at least one township which is covered by more than 25% water. Indeed the Calista Regional Corporation and the village corporations within the Calista region are far and away the most affected native corporations in the entire state of Alaska by the submerged lands issue.

For this reason, I am certain you can understand the importance of the issue to us and the gravity with which we approach it.

We in the Calista region, and Alaska natives generally, opposed the BLM decision in 1971 to implement a different system for the ascertainment and chargeability of submerged lands than had been theretofore utilized by the BLM. For nearly 100 years the BLM has, in varying degrees, implemented the decision of the United States Supreme Court in the case of Hardin v. Jordan, 140 U.S. 371 (1891). In that case, the court said, "it has been the practice of the government from its origin in disposing of public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for lands under the bed of the steam or other body of water."

Subsequent to that decision, BLM policy has been consistent, in the lower 48 states, specifically beds of non-navigable bodies of water belong to the upland owner, and the upland owner is not charged for the acreage.

In 1971, the Alaska Native Claims Settlement Act (ANCSA) was passed. Under this legislation, Alaska native corporations were to receive title to approximately 44 million acres of public

lands. But the native corporations were charged for all conveyed lands. As a result, a significant percentage of land entitlement was charged against the native corporations despite the fact that the lands were under water. This decision was absolutely contrary to departmental policy and the policy being implemented in all of the lower 48 states. In those states and under the departmental policy, the manual for survey was and is followed. The Manual of Instructions for Survey of Public Lands of the United States (1947) required that navigable bodies of water, as well as all lakes equal to or larger than 25 acres and streams and rivers equal to or wider than three chains, were to be excluded from the public lands and such acreage not charged against the entitlement of the land owner. The manual was revised in 1973 to change the size of the lakes from 25 acres to 50 acres. This is the procedure followed today in all other states but Alaska. Since the beginning of public lands surveys, it is the manual in force at the time of survey that is controlling.

For this reason, the native corporations should have been entitled to exclude from lands chargeable against their entitlement all lakes of 25 acres or more and all streams and rivers equal to or wider than approximately 198 feet. I suggest this constitutes a substantial concession by the natives to achieve a compromise acceptable to all parties.

From the passage of the Alaska Native Claims Settlement Act (ANCSA) in 1971, Alaska natives generally and Calista Corporation natives in particular felt something should be done to rectify this inequity. At various times lawsuits were discussed, but the decision was made to attempt a legislative resolution. The first opportunity for major changes in ANCSA occurred with the beginning of the consideration of the Alaska National Interest Lands Conservation Act in 1978. While a resolution similar to the manual of survey of 1973 was incorporated in the House bill, Senate language was adopted, and it is contained in the Alaska National Interest Lands Conservation Act signed by the president in 1980. Without getting into a great deal of detail, Section 901 of ANILCA set a statute of limitations in which the State of Alaska would be limited to five or seven years to challenge whether certain water bodies were navigable.

Despite the fact the state was the prime mover of Section 901 rather than the House version relating to submerged lands, in 1981 the sportsmen and the State of Alaska filed lawsuits challenging the constitutionality of Section 901 of ANILCA. Those two lawsuits have been combined and are presently pending in the District Court for the District of Alaska.

The uncertainty caused by the lawsuits and more sober reflection on Section 901 by the state and other parties led to continued negotiations among Alaska natives, the state, and the BLM. In December, 1983, a new policy was published in the FEDERAL REGISTER whereby neither the native corporations nor the state would be charged acreage against entitlement for water

bodies that are meanderable in accordance with the BLM manual of survey (1973). Those acreages are 50 acres are more for lakes and approximately 198 feet for streams.

On June 14, 1984 the Wilderness Society and Sierra Club filed suit in U.S. District Court for the District of Columbia challenging the validity of that action. That action, in which Calista Corporation has intervened is still pending in the U.S. District Court for the District of Columbia.

While the chargeability of acreage against the state and native entitlements was resolved by the administrative implementation of the BLM Manual of Survey (1973), the problem of the statute of limitations and the prospect of numerous lawsuits to determine the question of navigability under Section 901 of ANILCA was not resolved. For this reason, negotiations continued between the state, natives, and BLM. As a result of these negotiations, legislation was drafted and introduced by Senator Murkowski (S 485), which would mandate the use of BLM Manual of Survey (1973) and repeal of the statute of limitations established by Section 901 (ANILCA).

Despite these advantages there is a serious oversight in the legislation. From the outset of discussions between the State, Natives and BLM it was agreed that adoption of the BLM Manual for Survey would operate "ab initio."

That is to say that for any approved plat of survey upon which conveyance, or interim conveyance, was issued to the State or Native Corporation prior to December 5, 1983, [The date upon which the Secretary of Interior adopted the BLM Manual of Surveying Instructions (1973.)] and meanderable water bodies were not segregated from the survey but were included in the calculation of acreage to be charged against the State or native land entitlement, the chargeable acreage is to be recalculated to conform to the principles contained in (BLM) Manual of Surveying Instructions, (1973).

That understanding and agreement is carried into effect for the State of Alaska by the memorandum of agreement between the U.S. Dept. of the Interior and State of Alaska incorporated in S. 485. Unfortunately, there is no such memorandum of agreement between the Department of Interior and the Alaska Natives -- nor is there operative language in the statute to carrry out the basic understanding and agreement. One of the reasons for the oversight may well have been the failure to include the Alaska Natives in the agreement for the State because the State was to pay for any recalculation -- The Alaska Natives were not.

Without such retroactive effect, this legislation is almost totally ineffective in resolving the submerged lands issue for Alaska Natives. Approximately 90% of the lands due the native villages have been conveyed either by interim conveyance or

conveyance. If these lands are not subject to recalculation, S-485 is a hollow shell.

As I said earlier Mr. Chairman, I am certain this is an oversight. I know of no one who would deny the original understanding and agreement. For this reason, it will be a simple matter to remedy the fault. We are not suggesting this be done now. Such a change must be made, however, before the legislation emerges from this Committee. We will be pleased to present the committee with a suggested amendment at the appropriate time.

Calista Corporation was involved with other Alaska native corporations in the negotiations culminating in the introduction of S-485. With the changes heretofore suggested, Calista Corporation is strongly supportive of S-485 and feels that its passage would:

* provide full entitlement to the state and natives,
* prevent protracted and costly litigation between the state and native villages,
* resolve pending cases regarding chargeability and other matters,
* reduce delays in conveyance of native and state lands,
* and finally, reduce friction and antagonism between all the parties.

Calista has joined in discussions under the auspices of the staff of the House Committee on Interior and Insular Affairs. We recognize that it is necessary for all the parties to attempt to find solutions to the submerged lands issue, which may not be totally satisfactory to any party. In that spirit, we have advanced for discussion purposes the concept of resolving the matter along the lines contained in S-485 with the exception that additional uplands made available by changing the rules of chargeability not be selected from within conservation system units (CSUs), but taken as in lieu selections from other public lands within the state.

We are presently examining this concept among our villages, other Alaska natives, the state, federal government, and conservationists.

While we support the request for a simple one-year extension of the statute of limitations contained in Section 901 (ANILCA), we do so in the hope that other parties will join with us in attempting to achieve a constructive resolution of this issue which affects us more than any other group of people. It is critical that a one-year extension not become the first in a series of extensions of the statute of limitations which simply prolongs the just resolution of a serious problem.

Thank you for your consideration.

Senator WALLOP. Senator Murkowski will be unable to appear at the hearing this morning. There are technical difficulties at the Veterans' Committee meeting that has prevented him from leaving.

He sends his regrets but his statement will be included in the record.

[The prepared statement of Senator Murkowski follows:]

OPENING STATEMENT OF
SENATOR FRANK H. MURKOWSKI
H.R 3851
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
PUBLIC LANDS, RESERVED WATER AND RESOURCES CONSERVATION SUBCOMMITTEE
JANUARY 30, 1986

Good morning ladies and gentlemen. The purpose of this hearing is to take testimony on H.R. 3851, a bill to amend Section 901(a) of the Alaska National Interest Lands Conservation Act.

Section 901(a) establishes a five year statute of limitations for judicial actions contesting determinations by the Bureau of Land Management concerning the status of submerged lands in Alaska that have been conveyed to Alaska Native Corporations. H.R. 3851 would change that limitation to six years--in effect, granting a one-year extension of the time period for filing such suits.

The submerged lands issue arises out of the interaction between the Alaska Statehood Act and the Alaska Native Claims Settlement Act. Since its admission to the Union, Alaska has, with certain exceptions, owned all the land under navigable bodies of water in the State. Whether a particular body of water is navigable is a legal question that must be answered on a case by case basis.

Under the Settlement Act, BLM has responsibility for conveying large tracts of federal land to Native Corporations. Whenever a tract contains a body of water, BLM must determine whether it is navigable or non-navigable. If the water body is found to be navigable, the land under it is not transferred to the Native Corporation because it is State land. If the BLM decides that the water is non-navigable, the submerged land is transferred to the Native Corporation.

Section 901(a) requires any lawsuit challenging such a navigability decision to be filed within five years of the date the land was conveyed. It applies to any land conveyed after December 2, 1980. As a result, the deadline for initial suits by the State to challenge submerged lands conveyances is fast approaching.

Representatives of Alaska Native groups, the State of Alaska, and interested conservation organizations have been negotating toward an overall settlement of the submerged lands issue. Such an agreement would eliminate the necessity for any lawsuits challenging the BLM navigability determinations. I understand that the parties are very close to reaching such an agreement. The deadline for filing the initial suits will, unfortunately, expire before that settlement is finally agreed to.

The State could file the initial suits simply to protect its interests while the settlement is being worked out. To avoid the time and expense of that exercise, however, the parties all agreed to extend the statute of limitations one year and the House passed H.R. 3851 last December to reflect that agreement.

The testimony today should focus on the need for this one year extension. I understand that some of the witnesses have expressed a desire to speak on the merits of an overall settlement as well. Those who wish do so may. However, I must reiterate that the primary purpose of this hearing is to gather information on the one year extension.

Thank you.

Senator WALLOP. Now, Mr. Tom Gilfoy, assistant general counsel, Southern California Edison and Mr. Steven Whitney, natural resources coordinator, National Parks and Conservation Association on Senate Joint Resolution 221 and House Joint Resolution 382.

Mr. Gilfoy.

STATEMENT OF TOM P. GILFOY, ASSISTANT GENERAL COUNSEL, SOUTHERN CALIFORNIA EDISON CO.

Mr. GILFOY. Mr. Chairman, thank you very much for the opportunity to summarize our relatively long prepared statement. But before I do so, I would like to express our disappointment for not being able to work out some sort of a compromise with the National Parks and Conservation Association. They are a fine organization, with a well-deserved reputation for helping to protect our national parks.

Frankly, I am somewhat saddened by the fact that Mr. Whitney is here today opposing this measure, since Southern California Edison Co. has, if I may say so, a well-deserved reputation for being able to work out these kinds of problems and being able to strike the right balance between our need to produce power and protect the environment.

Before I go on into my prepared statement, if I may just address some of the comments that were made regarding a recommended amendment to our measure. I might point out that this bill, when it was introduced by Senators Cranston and Wilson, according to the statement made by Senator Cranston at that time, did contemplate some possible amendment that would limit the duration.

We liked the bill as it was introduced. It tied it to further licenses or permission that we may receive from other governmental agencies, but a compromise was worked out in the House that would limit the bill to 10 years with two 10-year renewals.

We support that amendment, and that bill in that form actually passed the House.

Edison recognizes and believes that one of the purposes of this country's system of national parks is to preserve areas of unique scenic beauty. Moreover, we recognize and believe that Sequoia National Park, with its groves of giant sequoia trees and beautiful High Sierra back country, is uniquely qualified to be a part of the National Park System.

We can understand how it would be objectionable if it were the purpose of Senate Joint Resolution. 221 to convert these beautiful scenic areas of Sequoia into some kind of large-scale hydroelectric development. But we have no such plans and the proposed resolution you are considering does not purport to authorize anything of this kind.

All that is intended by the resolution is to reauthorize the continuation of facilities that have existed in their present locations since 1901 and 1913.

The consequences of removing the hydroelectric facilities from the park would, in our judgment, be far more environmentally disruptive to park values than leaving everything like it is. We don't know how, for example, we could remove the diversion dams with-

out cutting new roads in to bring in heavy equipment. Blasting might even be required.

The scars left by this activity would be far more disruptive to the park's environment than leaving everything like it has been for the last 75 years. And what about the costs and the losses that would be associated with the new generation that would be required? This loss would have to be made up some way.

Over 26 million kilowatthours of generation would be lost in an average year if the facilities in the park are removed. That's small compared to the overall size of the Edison Co., admittedly, but it's still a very significant amount of electricity. It's enough to satisfy the needs of 14,860 people.

On the Edison system, this loss generation would have to be made up by burning oil or gas at one of our steam electric generating stations. Unlike falling water, oil and gas are nonrenewable resources. Once burned, they are gone forever. And, unlike using falling water to generate electricity, burning oil and gas would contribute to the air pollution problems in the Greater Los Angeles Area.

One final point that I would like to emphasize, and that is that none of the major electrical facilities associated with the project are located within the park's boundaries. The powerhouses and other major electrical facilities are on land owned by the company outside the park. What is actually in the park is shown on some of those maps, Senator, that I saw you unfolding, and you can see from those that all that's in the park at one location is a stream level diversion dam that diverts water from the middle fork of the Kaweah River on over and into the powerhouse, which is on land owned by the Southern California Edison Co. outside of the park boundaries.

In the other location, up in the back country of the Mineral King Valley—which may ring a bell from the standpoint of this being the area in which Walt Disney had originally planned a major ski resort and Swiss-village-type development—there are four small rubble dams that were originally installed before the area was in fact a part of Sequoia National Park. These dams went in over a period beginning in 1900 and were finished in 1905.

This part of Sequoia Park did not become a part of the National Park until 1978, and so they were there for well over 70 years and were incorporated as a result of the incorporation of the Mineral King Valley into the park in 1978.

Senator, I thank you for your kind comments, what you said about the undesirability of getting this tied up in some kind of an administrative dispute between the Park Service or the Department of the Interior and FERC. We share your concern about that and would be hopeful that that dispute can be resolved from a jurisdictional standpoint in some way that will not tie up this legislation.

We've been sitting there since December 14 without any rights, so technically we're not there with any kind of permission, any kind of legislative authority, and would urge early action for that reason.

Thank you very much.

[The prepared statement of Mr. Gilfoy follows:]

58-930 O - 86 - 3

STATEMENT OF SOUTHERN CALIFORNIA EDISON COMPANY REGARDING S. J. RES. 221 AND H. J. RES. 382

BEFORE THE SUBCOMMITTEE ON PUBLIC LANDS,
RESERVED WATER AND RESOURCE CONSERVATION,
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

January 30, 1986

MR. CHAIRMAN, MEMBERS OF THE SUBCOMMITTEE:

My name is Tom P. Gilfoy. I am an Assistant General Counsel at Southern California Edison Company (Edison) where my responsibilities include licensing hydroelectric projects. I have a special personal interest in Senate Joint Resolution 221 as it will affect Sequoia National Park, where I have camped and backpacked for over 45 years.

Sequoia, one of the nation's first National Parks, is located near the southern end of the Sierra Nevada Mountains in California.

I

Introduction

Edison is an investor-owned, electric utility providing electric power service in a 50,000 square mile area of Central and Southern California. This area, which has a population of more than nine million people, includes some 800 cities and communities.

Most of Edison's generating capacity is from oil- and gas-fired generating units. A significant part is also from coal and nuclear generation. Although only about six percent is from hydroelectric generation, it is the very fact of this small proportion that makes it so important for Edison to try to keep all of its hydroelectric resources intact for its customers. Hydroelectric generation is a clean, inexpensive way of providing

electricity without polluting the air or using any of the nation's nonrenewable resources.

S.J.Res. 221 and H.J.Res. 382 each would authorize the Secretary of Interior to issue to Edison a permit to continue to operate certain parts of an existing hydroelectric project in Sequoia National Park (Kaweah Project Nos. 1 and 3). Current Congressional authorization for the hydroelectric facilities expired on December 14 of last year.

Edison recognizes and believes that one of the purposes of this country's system of national parks is to preserve areas of unique scenic beauty. We also recognize and believe that Sequoia National Park (the Park), with its groves of giant Sequoia trees and beautiful High Sierra back country, is uniquely qualified to be a part of this park system. We can understand how it would be objectionable if it were the purpose of Senate Joint Resolution 221 to convert these beautiful scenic areas of Sequoia into some kind of large-scale hydroelectric development. Edison has no such plans and the proposed Resolution you are considering does not purport to authorize anything of this kind. All that's intended by the Resolution is to reauthorize the continuation of certain facilities that have existed in their present locations since 1901 and 1913.

Essentially all that is located within the boundaries of the Park are flowlines, diversion structures, four small dams that enlarge the size of four natural lakes, and other minor appurtenances. The major Kaweah Project facilities, such as the powerhouses, switchracks and other electrical components, are

located outside the Park boundaries on land owned by Southern California Edison.

II

General Description of the Area Where Hydroelectric Facilities Are Located in the Park

Let me be more specific about the location of the facilities we are talking about by directing your attention to the two maps attached to this statement (Exhibit A). The location of the Project facilities is shown on these maps.

A. Middle Fork Development (Kaweah No. 3)

The area around the hydroelectric facilities on the Middle Fork of the Kaweah River is relatively low in elevation and is in a transition zone between oak woodland and chaparral forest types. Although we find neither supportive nor contradictory documentation, it appears evident that the inclusion of this transition zone within the boundaries of the Park was merely an incident to drawing a straight boundary line on a map rather than it being included because of its unique scenic beauty. We believe any objective observer would agree that it was not this part of the Park that made Sequoia worthy of inclusion in the park system.

Pictures are attached to this statement which I believe support this observation. (See Exhibits B through D) You may see from them that insofar as those portions of the Kaweah No. 3 Project that are located within the Park are concerned, both visual and physical access to the facilities from the highway are

58-930 O - 86 - 4

restricted in most locations due to the precipitous nature of the terrain and the overgrowth of native brush that now, after more than seventy years, affords an effective natural screen. Thus, these facilities, which are low profile in design and wherever possible constructed of native materials, have for the most part blended with their natural surroundings to a degree that they probably are unnoticed by most travelers going to the Park's main attractions. For the most part, one must be familiar with these facilities and actively seek them out in order to detect them from the highway or the river area.

The Edison facilities are not the only development in this part of the Park. The Park at this location is also a transition zone between the commercial-residential area to the south and the undeveloped, rugged, mountainous terrain several miles to the northeast. In the general vicinity of the Kaweah No. 3 facilities are located a large, modern National Park Service administrative area, a National Park Service maintenance area and the General's Highway, which provides access to the upper reaches of the Park proper.

The Park Service's Potwisha Campground is adjacent to one of the flowlines. Water is supplied to Potwisha campers from the flowline by means of a water tank. One of the more conspicuous structures on Park Service land connected with the hydroelectric development is this Park Service water tank.

B. Mineral King Valley (Kaweah No. 1)

Now let me direct your attention to a series of photographs showing the small dams in the Mineral King Valley. (Exhibits E through H) The pictures show four lakes identified as Monarch, Crystal, Franklin and Eagle Lakes. The small dams that were built at the outlet of each lake in 1901 are visible in each picture. The highest of these dams is 22 feet at its highest point. The area that may be seen between the spillway elevation and the natural lake elevation is what is used for storage to supplement the amount of water available for generation at the Kaweah No. 1 Powerhouse.

In contrast to the area where the Kaweah No. 3 facilities are located, the lakes are located in very high, rugged, mountainous terrain. Elevations for the lakes range between 10,785 feet at Crystal Lake and 9,995 feet at Eagle Lake. Only Eagle Lake is below timberline and has significant tree growth around its shore. This is a spectacularly scenic area quite popular with hikers and backpackers. Some of you may remember that the Mineral King Valley was once approved by the U.S. Forest Service for a large-scale, Swiss-village-type development proposed by Disney Enterprises. The incorporation of the Valley into Sequoia National Park in 1978 put an end to over ten years of legal battles about this proposal.

The only access to the Mineral King Valley is via a 25 mile, twisting-turning, partially paved road. There is no road access to the four lakes. They are reached by trail only.

The operation of the dams in the Mineral King Valley has no significant detrimental impact on the fishery of the lakes. In fact, flow from the lakes is maintained over a longer period of time than would naturally occur. Thus, the retention of runoff and the release of water from the dams not only contributes to the generation of electricity, but also helps maintain the fishery in the streams below the lakes.

III

History of the Project

Since there has been hydroelectric development on the Kaweah River for nearly as long as Sequoia has been a national park, a brief review of this development may be useful.

Hydroelectric development on the Kaweah River began as early as 1899 when one of the predecessor companies of Southern California Edison Company (the Mt. Whitney Power Company, a small power company serving the local area) began construction of the Kaweah No. 1 hydroelectric power plant on property which was then entirely outside the present boundaries of Sequoia National Park[1].

Soon thereafter, it became apparent that more development was going to be necessary to serve the growing requirements of the local service area and in 1902, a formal application was made to the Secretary of the Interior (the

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1 Sequoia National Park had been created nine years earlier; i.e., on September 25, 1890. (C 926 Para. 1, 26 Stat. 478)

Secretary) for permission to make surveys within Sequoia National Park.[2] Permission to make the surveys was granted by the Secretary on February 28, 1906, and on February 25, 1907, an application for the construction of Kaweah No. 3 project was approved.

Due to the continued growth of power demand, this authorization went through several evolutionary changes until finally, on March 5, 1912, the Secretary issued a new permit which enlarged the original authorization so as to permit construction of not only the Kaweah No. 3 Project within the Park, but also another hydroelectric development consisting of a powerhouse, dam and reservoir, which was identified as Kaweah No. 5.

Kaweah No. 3 was ultimately constructed and put into operation in May, 1913, but Kaweah No. 5 met another fate. Although considerable work was done on Kaweah No. 5, including partial completion of the dam for the reservoir, plans for it

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2 The Letter of Application stated that "In making the said appropriations of water from these streams, points of diversion have been selected in the lower altitudes of the Park which are seldom frequented by tourists and pleasure seekers, and where summer temperatures are high, and the higher altitudes where natural conditions are more picturesque and which are frequented by tourists during many months of each year, have not been selected. The altitudes for our points of diversion are about three thousand feet above sea level, while the pine timberline does not reach below about thirty-five hundred feet elevation above sea level. The elevations of the Sequoia National Park most used by tourists are in altitudes of five thousand feet and over." (Pages 2 and 3 of Letter of Application filed January 29, 1902)

were ultimately abandoned; the abandonment being accepted by the Department of Interior on April 7, 1930.[3]

With the exception of the growth of screening foliage, Powerhouse No. 3 with its appurtenant flowlines and diversions within Sequoia National Park still looks pretty much the same as it did when first constructed. However, its relationship to the Park's boundary has changed. Initially, a part of the powerhouse and other Edison buildings were located on Park Service land. But in 1936, because of the Park Service's interest in some Edison-owned land just outside the entrance to the Park, an exchange of lands was initiated. It took until July, 1949, for this exchange to be completed; the net effect of which was for the Park Service to get the land that it desired at the Park entrance in exchange for conveying the land where the powerhouse and buildings were located to the Edison Company. Accordingly, the powerhouse and other buildings that were originally constructed inside the Park are now located outside Park boundaries.

As noted earlier, the Kaweah No. 1 Project was originally constructed in a location that was not then a part of Sequoia National Park. The powerhouse, flowline, diversion structure and all electrical facilities are to this day still

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3 It is significant to note that up until 1930 authorization continued to exist to permit a full-scale hydroelectric project entirely within Sequoia National Park, including dams, reservoirs, etc. Just why these plans were abandoned is not entirely clear from the record, but it appears that the problem was one of economics and not because of opposition by someone seeking to preserve the Park.

outside Park boundaries. However, 79 years after original construction, the National Parks and Recreation Act of 1978 incorporated the Mineral King Valley into the Park and along with it the four small dams that are a part of Kaweah Project No. 1.

The original 50-year permit for the Middle Fork development has long since expired. However, in 1967, pursuant to P.L. 88-47, Congress authorized the Park Service to extend the rights for the Kaweah No. 3 facilities to remain in the Park to August 6, 1974. (This was the same date as the expiration of Southern California Edison Company's original Federal Power Commission license. Proceedings to relicense the Kaweah Project have been pending before the Federal Energy Regulatory Commission (FERC) since 1974. During the interim, FERC has been issuing annual licenses.) In 1974, pursuant to P.L. 93-522, the Department of Interior was authorized to issue a permit for Kaweah Project No. 3 for an additional ten years.

The National Parks and Recreation Act of 1978 included authorization for the Mineral King dams to remain in the Park pursuant to the same terms as the Kaweah Project No. 3 facilities were authorized to remain under P.L. 93-522. The Congressional authorization at both locations expired in December, 1985.

IV

Effects of Removal

The most obvious effect from removing the Kaweah No. 3 diversions and flowlines from the Park is that it would make the

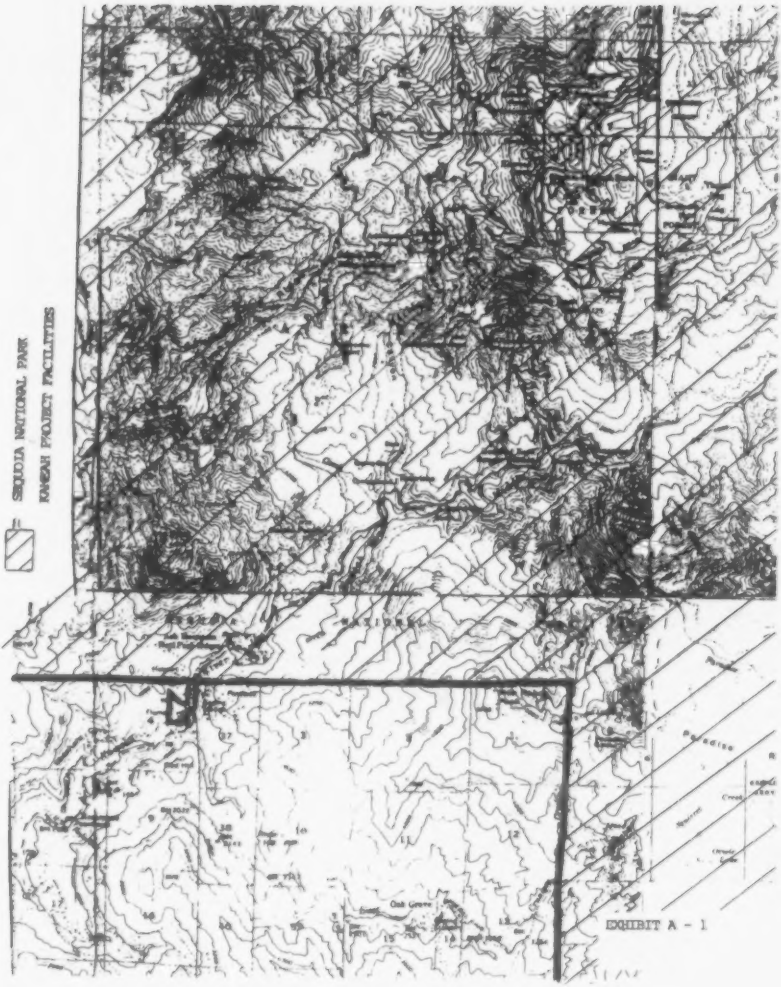
rest of this project useless; i.e., the powerhouse and other appurtenances outside the Park cannot generate electricity if the diversions and flowlines in the Park are not available as they are Powerhouse No. 3's only source of water. This would mean the loss of an important source of electric power from a clean, renewable resource. Lost generation would be about 25 million kilowatthours annually, or enough electricity to serve 3,592 average homes or about 13,290 people annually.

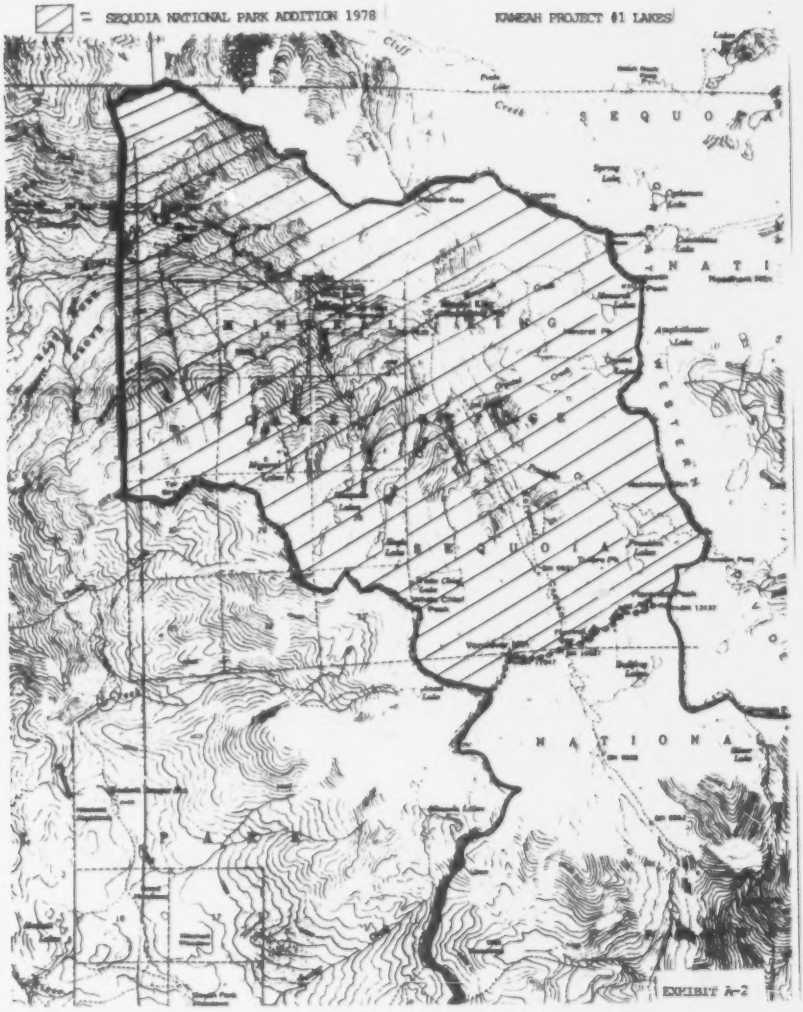
If the storage capacity at the four lakes in the Mineral King Valley is lost due to dam removal, it would mean that 1,071,361 kilowatthours less energy would be generated at Powerhouse No. 1. This is the equivalent of enough electricity to serve 154 homes or about 570 people annually. Any lost generation on the Kaweah Project would have to be made up by additional generation at one of Southern California Edison Company's steam electric generating stations. This would require burning nonrenewable fossil fuels such as oil or gas in place of using the clean, renewable resource represented by falling water.

Most significantly from the standpoint of Park values, there has been no showing that we are aware of indicating that the removal of facilities in the Park would be a net environmental benefit. Blasting and the use of heavy equipment would no doubt be required if the dams and other structures in the Park were to be removed. This would seem to be more detrimental to the environment than leaving the facilities where they have been for so many years. Certainly elimination of late season streamflow from the dams would be a net detriment to the fishery on the East Fork of the Kaweah River.

Summary

In summary, we would like to emphasize what we believe has been inherent throughout this statement--we would never seek the authorization represented by S.J.R. 221 to construct a new hydroelectric facility in a national park. We are only requesting authority to allow the existing facilities to remain where they have been for so many years.


SEQUOIA NATIONAL PARK
KAWEAH PROJECT FACILITIES
N
EXHIBIT A - 1


= SEQUOIA NATIONAL PARK ADDITION 1978
KAWEAH PROJECT #1 LAKES
EXHIBIT A-2

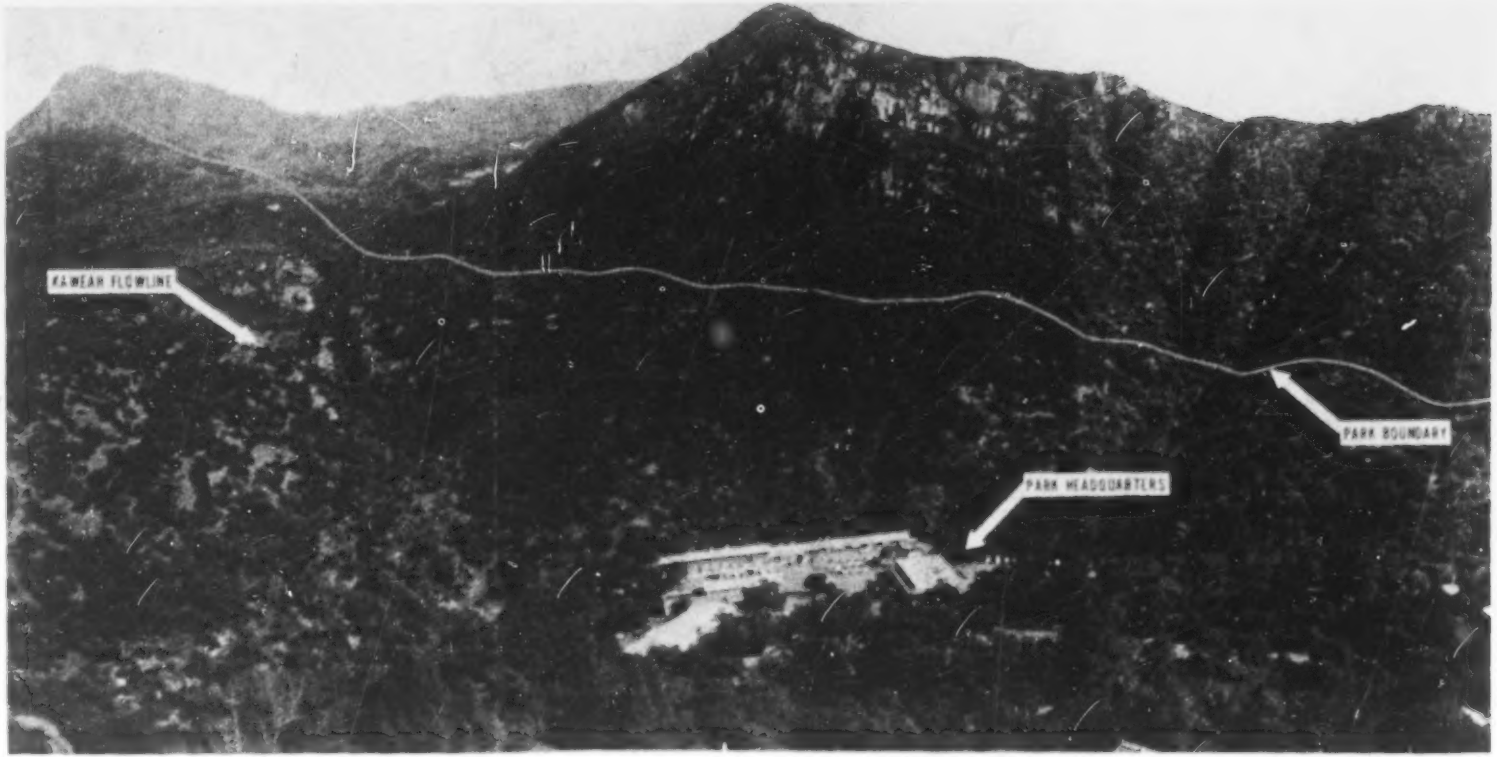
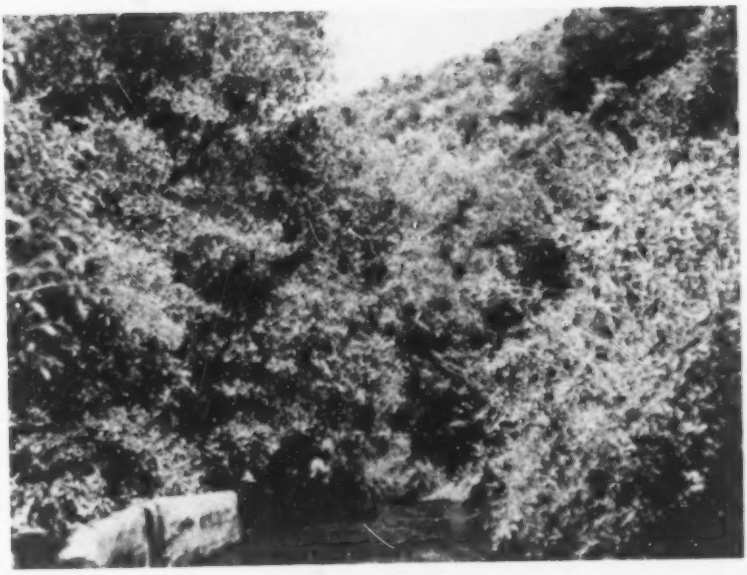


EXHIBIT B

PANORAMIC VIEW OF LOWER 4-1/2 MILES OF PROJECT AREA. KAWEAH PROJECT SEQUOIA PARK BOUNDARY LINE AND PARK ADMINISTRATIVE AREA ARE ANNOTATED.



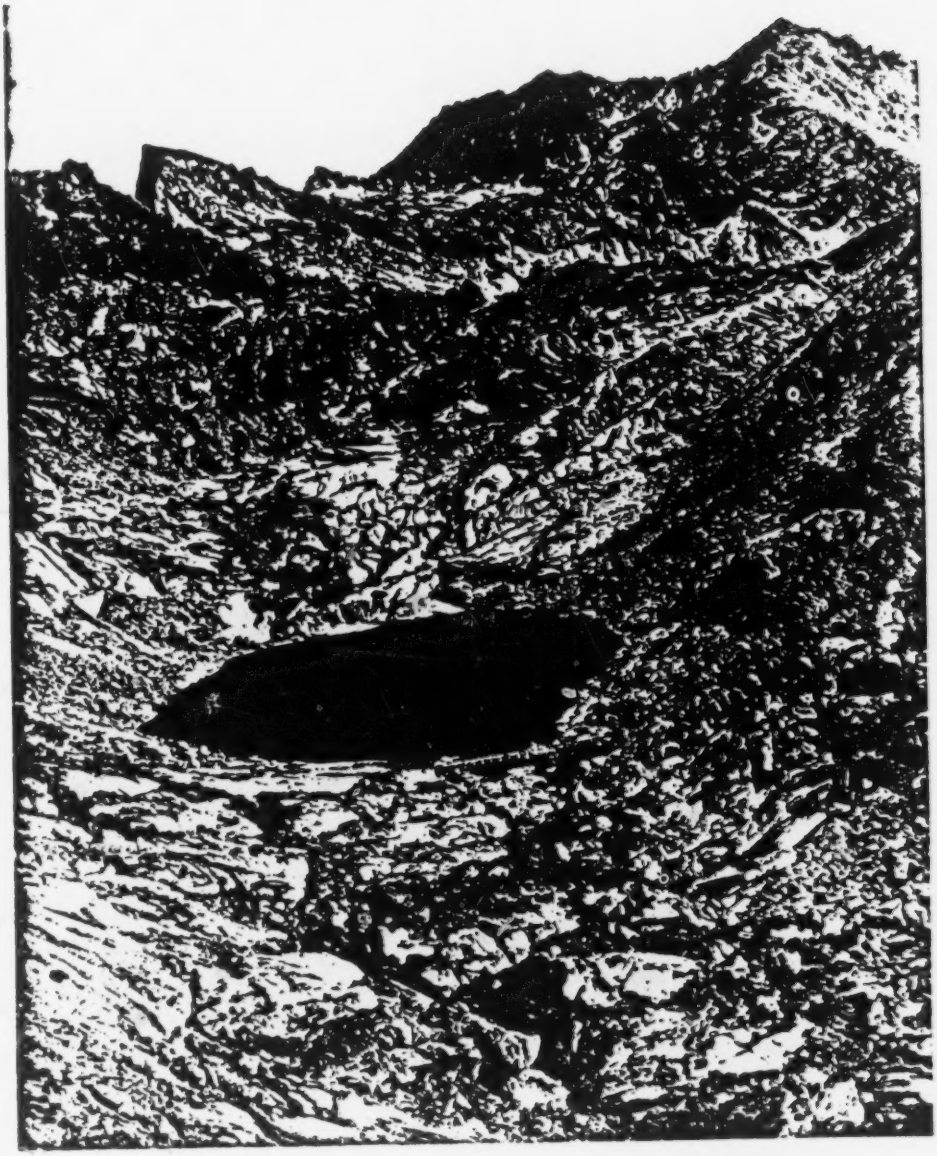
MIDDLE FORK CONDUIT AND OVERGROWTH OF NATIVE VEGETATION MIDWAY BETWEEN INTAKE AND FOREBAY

MARBLE FORK CONDUIT AND OVERGROWTH OF NATIVE VEGETATION NEAR POTWISHA CAMPGROUND

EXHIBIT C

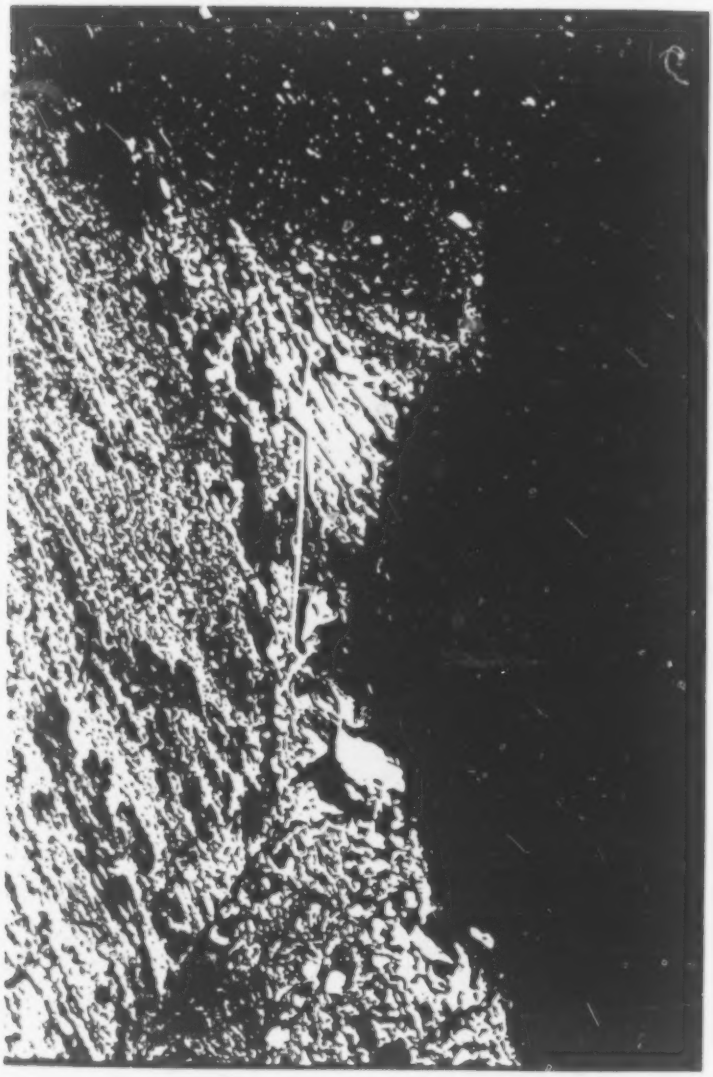
FIGURE 11

MIDDLE FORK DIVERSION DAM AS VIEWED FROM THE GENERAL'S HIGHWAY

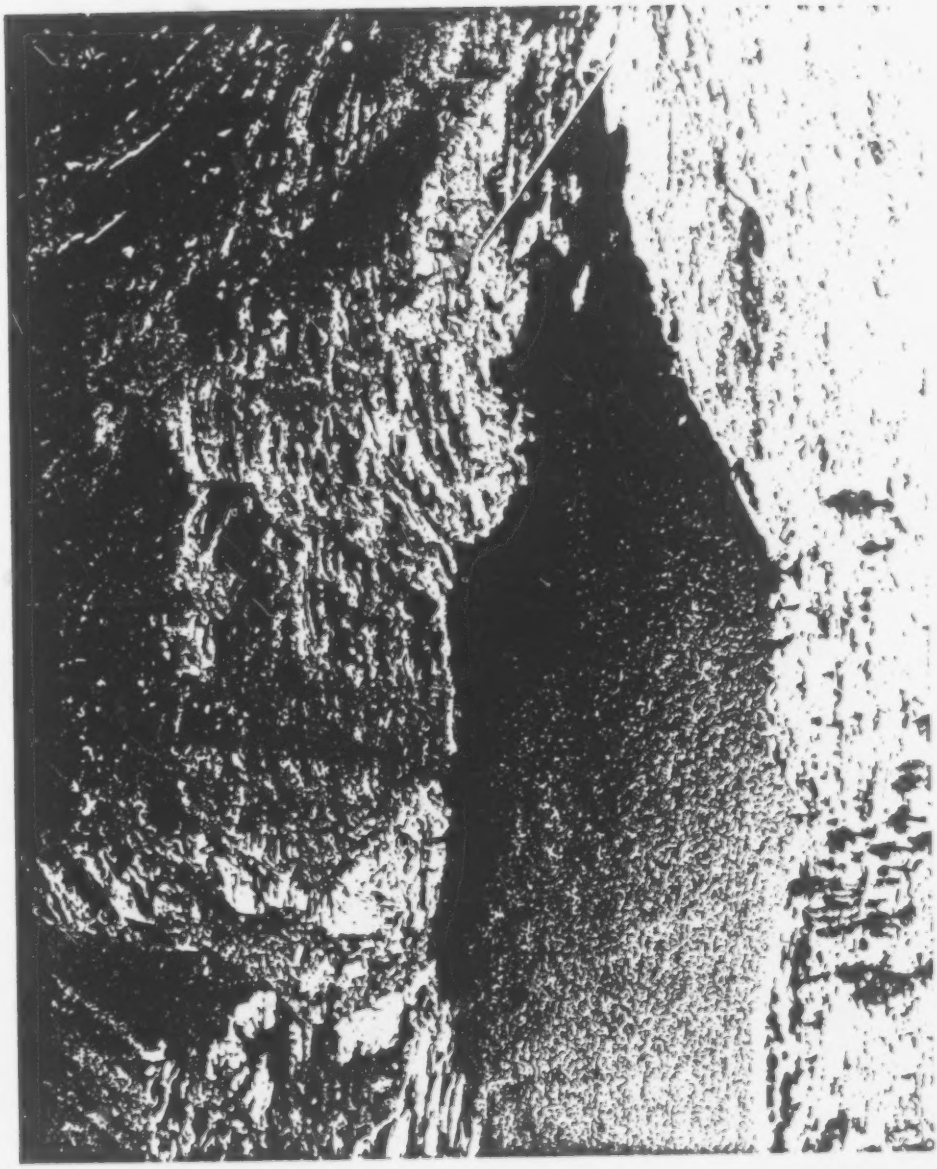


MONARCH LAKE

EXHIBIT E



CRYSTAL LAKE EXHIBIT F



FRANKLIN LAKE

EXHIBIT G

EAGLE LAKE EXHIBIT H

Senator WALLOP. Thank you, Mr. Gilfoy.
Mr. Whitney.

STATEMENT OF STEVEN C. WHITNEY, NATURAL RESOURCES COORDINATOR, NATIONAL PARKS AND CONSERVATION ASSOCIATION

Mr. WHITNEY. Mr. Chairman, my name is Steve Whitney and I am the natural resources coordinator for National Parks and Conservation Association.

NPCA is a 66-year-old organization that focuses on national parks. We're a nonprofit national membership group.

I have submitted my written testimony for the record, and I will just summarize briefly, if that's all right. Before I do, I would like to preface my remarks, to thank Mr. Gilfoy about the kind words about the work of my organization and we certainly appreciate the willingness Southern California Edison has shown to work with us on actually this and other issues within their service territory and within the area served by their transmission lines and so on.

To begin, I've got to say that we reviewed this legislation pretty carefully, and in doing that we looked at not only the Sequoia National Park authorizing legislation which calls for the preservation of all of the natural curiosities and wonders of the park, for them to be preserved in their natural condition, but we also researched the project, we looked at the study done by a congressional request, we talked at length with Southern California Edison in our offices and on the telephone subsequent to that, reviewed National Park Service actions elsewhere in the park system recently which are contrary to the position taken on this project.

Frankly, we could not come to the conclusion that we could support enactment of the bill. Based on these reasons and others, we would encourage the committee to take a real careful look at the legislation and hopefully you would reach the same conclusion. However, if you didn't, and if you chose to move the bill, there are some specific things that we would like to bring up, if you will, for consideration.

The first deals with the House bill language that calls for the Secretary to issue a 10-year permit with the possibility of two 10-year extensions. We support the 10-year limitation, but we really feel that this is an important enough issue in an important enough place, particularly an important enough part of Sequoia National Park, that the Congress ought to revisit the issue with full hearings and so on on a 10-year interval basis.

Second, the House language calls for 60-day review of permanent renewals at 10-year intervals; that is, would be in 1996 and the year 2006, but it does not provide for such a review for the original permit to be issued this year in 1986.

We think it's reasonable that language should be included that allows the committee and their staff to review the original permit as well, just to see what we're looking at for the years 1986 to 1996.

Third, the House bills differs in section 3 from the Senate version, and while we generally support the House language, there are some specific conditions that we think should be reviewed for potential inclusion in the special use permit.

One is the provision for enhanced monitoring of the structural integrity of the flumes. These are old structures. I've seen evidence both ways on how structurally sound they are. Monitoring seems to be the safe way to go, and an enhanced program may be helpful.

That the committee be required to make any needed repair to the facilities as identified by the Park Service. In their role as protector and manager of the resource, they need to, when appropriate, identify repairs that are needed.

The correction of all past or future damage to park resources. There have been some releases of water which is caused from erosion damage in the park and so on. We think that Southern California Edison, as a condition of their privilege of being in the park, should be required to repair some of those eroded areas.

The removal, restoration, and rehabilitation issue that Mr. Smith mentioned this morning, upon abandonment, and another look at minimum flow requirements. It's been 23 years since they've been looked at, and a lot of information has been gained since then. It might be useful to take another look and see if the minimum flow requirements, that is, the amount of water left in the streambed after the diversion is in fact still adequate based on 1986 criteria.

The last specific issue we'd like to raise has to do with the fact that we're really talking about two Kaweah-related facilities. One is the Kaweah No. 3 structures which are diversion dams, flumes and so on which were addressed in the 1975 legislation, and the other are four small dams in the Mineral King addition that were added to the park in 1978.

The 1975 legislation was, of course, silent on those four dams because they were not under the jurisdiction of the Park Service. We believe that this legislation is somewhat cloudy in that it merely refers to "the Kaweah facilities." We'd like to see some clarification given as to whether we're talking about the Kaweah No. 3 structures and so on which were the subject of the technical report prepared at Congress' request, or whether we're also talking inclusive of the four dams in the Mineral King.

Perhaps we can get into some of the details of that subsequently. But we think there are probably several ways the repair problem could be dealt with and we'll just offer three possible courses of action. One would be to take what the House did and that's simply to include the four dams within the authority granted to the Secretary.

The only problem with that is it's not responsive to Park Service testimony in the House which basically said there's not enough information known about these four dams to determine whether they should be repermitted. That is, there is an information gap that needs to be filled before that action is really appropriate from our perspective.

Second, the committee could clarify that the legislation does not provide permit authorization for the Kaweah No. 1 dams, and instruct the Park Service to complete the needed studies they have expressed their intent to do, and then deal with the issue separately.

A third possibility would be to require Southern California Edison as a condition of the Kaweah No. 3 extension, to relinquish ownership and management of the four dams in the Mineral King.

There are probably others, and we'd like to offer any assistance we might provide to the committee and the staff in analyzing and evaluating what alternatives may be appropriate.

Mr. Chairman, that essentially summarizes my statement and I do appreciate the opportunity to be here and will be happy to answer any questions you might have.

[The prepared statement of Mr. Whitney follows:]

STATEMENT OF STEVEN C. WHITNEY
NATIONAL PARKS AND CONSERVATION ASSOCIATION

ON S.J. Res. 221 and H.J. RES. 382

COMMITTEE ON ENERGY AND NATURAL RESOURCES

SUBCOMMITTEE ON
PUBLIC LANDS, RESERVED WATER, AND RESOURCE CONSERVATION

January 30, 1986

Mr. Chairman, and other distinguished members of this committee, my name is Steven C. Whitney and I serve as Natural Resources Coordinator for the National Parks and Conservation Association (NPCA). NPCA is a private, non-profit membership organization, dedicated to promoting the values and purposes of the National Park System. It is from this perspective that I speak today on Senate Joint Resolution 221 and House Joint Resolution 382 to authorize the continued use of certain lands within the Sequoia National Park by portions of an existing hydroelectric project. We oppose this measure.

At first glance these measures appear to be fairly innocuous and routine pieces of legislation. However, after researching the project, speaking with park professionals, reviewing the legislative requirements of the Sequoia National Park authorizing legislation and the National Park System Organic Act, and considering recent National Park Service actions to cease operation or oppose construction of similar hydroelectric projects elsewhere in Park System, we believe there are both specific questions and questions of a fundamental nature, that need to be asked and considered prior to moving forward. We appreciate this opportunity to add our perspective to the hearing record and we hope it will serve to facilitate a decision which is fully protective of park resources and consistent with the purposes for which the park was created.

Sequoia National Park was created in 1890 to "...provide for the preservation from injury all timber, mineral deposits, natural curiousities or wonders within said Park and their retention in a natural condition." The Act also required the Secretary to provide against, "...the wanton destruction of the fish and game found within said park and against their capture or destruction, for the purpose of merchandise or profit." Augmenting this language in 1916 was the National Park Service Organic Act with its strong mandate for resource protection.

Mr. Chairman, as you know Congress passed legislation in 1974 which authorized the Secretary of the Interior to issue a permit to Southern California Edison Company for the continued operation of the Kaweah No. 3 hydro-electric generating facilities in Sequoia National Park for a period of 10 years. As a part of this legislation, the Congress included a requirement that the National Park Service prepare a report analyzing the impact of the Kaweah No. 3 project on the resources and values of Sequoia National Park. The NPS contracted with private consultants to conduct this assessment and the consultant's report was issued in February 1984.

This report analyzes and documents impacts on aquatic flora, invertebrate fauna, fishery resources, riparian vegetation, wildlife, recreation, visual impacts and aesthetic quality. This report also reveals that a structural analysis by a licensed structural engineer has determined that there are problems with the structural integrity of the system, that "...substantial continuing maintenance will be required to keep the system operating," and that "...given the age of the structures...structural failures could occur in the next few years if preventative repairs are not made."

This same report documents resource damage caused by failures of the Kaweah #3 flumes. According to the report, "...these failures have, observably, released substantial quantities of water which have created erosion damage to the landscape. Prevention of such washouts in the future would require an enhanced surveillance and maintenance system for the flumes and/or more sophisticated monitoring and controls (e.g. immediate shutdown capability) of the flow of water through the flume."

Mr. Chairman, it is unfortunate the Congress was not asked to approve the original project proposal some 80 years ago. That authority had been delegated to the Secretary of the Interior in 1901. Thankfully, legislation was passed in 1926 which recovered that authority for the Congress with respect to the Kaweah facilities. Your consideration of this measure results directly from that 1926 legislation, but we believe this 1986 review must be conducted using 1986 criteria and ground rules. This project would not likely be approved were it proposed for construction today.

For these reasons, we are not able to support the enactment of S.J. Res. 221 and H.J. Res. 382. We urge this committee to consider with a very critical eye the appropriateness of allowing such a use to continue within one of this Nation's premier National Parks. If after such a critical review, the committee determines that this use of national park resources is appropriate and should be allowed to continue, we believe there are several specific issues that need to be addressed as a part of committee consideration.

1. The House bill, HJR 382, differs in several respects from the Senate bill. A key difference is the provision that the Secretary may issue a permit limited to 10 years, with two 10-year extensions allowed after a sixty day review of the permit conditions by the appropriate House and

Senate Committees. We support the 10-year limitation, but we disagree with the automatic extension language. We believe this issue is important enough to warrant a full review of the issue by the Congress, including hearings, at ten year intervals.

2. We believe that the key Senate and House Committees should have the opportunity to review for 60 days, conditions placed on the permit to be issued this year should this legislation be enacted. The House language only provides for such a 60 day review on permit renewals in 1996 and 2006, not on the original 1986 permit. Such a 1986 review would allow a comparison between the permit conditions which have applied for the past 10 years, and those proposed for the period 1986 - 1996.

3. The House bill also differs in Section 3 from the Senate version. We generally support the House language which reads, "The permit shall contain a provision prohibiting expansion of the Kaweah Project in Sequoia National Park and shall also contain such other terms and conditions as the Secretary of the Interior shall deem necessary and proper for the management and care of Sequoia National Park and the purposes for which it was established." However, in addition to this general language, NPCA has identified the following specific conditions that we believe should be required in the special use permit.

A. Enhanced monitoring of the structural integrity of the facilities to ensure that catastrophic failures do not occur.

B. That the permittee be required to make any needed repairs to the Kaweah facilities as identified by the National Park Service.

C. The correction of all past or future damage to park resources attributable to the operation, maintenance or failure, of the Kaweah facilities.

D. The removal, restoration and rehabilitation, of affected watercourses and lands, when the permittee abandons the facility.

E. Adjustment of minimum flow requirements, if necessary, after a comprehensive NPS review of flow requirements now in place for the dewatered portion of the Kaweah River Basin.

4. Sequoia National Park contains structures which support operation of two Kaweah powerhouses, #1 and #3. The 1975 legislation which authorized a 10 year permit only addressed the Kaweah #3 diversion dams, flumes and associated structures. This is because the Kaweah #1 structures - 4 dams which serve to increase the water level of Eagle Lake, Lower Franklin Lake, Upper Monarch lake and Crystal Lake - are located on lands not added to the Park until 1978. The legislation before you today does not specify whether it applies only to the Kaweah #3 flumes as did the 1975 legislation, or whether it is inclusive of the four dams associated with Kaweah power house #1. This needs to be clarified.

There are many alternative ways to address this apparent problem. We offer three possible courses of action for committee consideration.

A. The House of Representatives simply chose to include the 4 dams within the authority granted to the Secretary. This is reflected both in the committee report, and in Mr. Vento's floor statement which reads in part, "...Hydroelectric facilities constructed within Sequoia Park in accordance with the 1912 permit include diversion structures on the Middle and Marble Forks of the Kaweah and flumes to the power house. The facilities also include rubble dams which were built in the early 1900's to enlarge four small lakes." This position ignores National Park Service testimony in the House, and subsequent follow-up correspondence to Chairman Udall from the Interior Department, that additional study is needed to determine whether or not these 4 dams should be permitted.

B. The committee could clarify that this legislation does not provide permit authorization for the Kaweah #1 dams, and instruct the National Park Service to complete the needed studies to determine whether permitting of these dams is appropriate. The National Park Service expressed their intent to conduct such an assessment in their testimony before the House Subcommittee on National Parks and Recreation. This intent was reiterated in the above-referenced letter from the Office of the Secretary, U.S Department of Interior, to Chairman Udall dated October 31, 1985.

C. This legislation could require as a condition of the Kaweah #3 authorization, that Southern California Edison relinquish ownership and control of these four dams to the National park Service. Southern California Edison has stated that the value of these dams to their operation is inconsequential and we understand they would be willing to turn over their operation to the National Park Service.

Mr. Chairman, we would like to offer our assistance to the committee in evaluating these or other possible courses of action to address these Kaweah #1 dams. Frankly, this is one key issue which has remained cloudy until today, and we appreciate the opportunity this hearing has provided to raise it for consideration.

NPCA also appreciates the opportunity to pose what we see as the fundamental question before this distinguished committee. That is, is this use of national park resources consistent with the purposes for which Sequoia National Park was established, with the National Park System Organic Act, and with positions taken by the National Park Service on very similar projects in recent months? This is the fundamental question that, to our knowledge, has never been asked of the National Park Service. We appreciate the opportunity to offer it before this commmittee today.

Mr. Chairman, in summary, NPCA opposes enactment of this measure and the continued use of Sequoia National Park for purposes of generating hydro-electric power. Our position was not reached quickly, nor do we take our conclusions lightly. We sincerely hope that our testimony will be useful during your deliberations on these measures.

Mr. Chairman, thank you for the opportunity to testify. I will be happy to answer any questions you may have.

Senator WALLOP. Mr. Whitney, who would do the monitoring?

Mr. WHITNEY. The monitoring of the facilities? I assume that Southern California Edison would be required to do that as a condition of the permit.

The Park Service, of course, also is responsible for managing the resource and there should be followup to confirm what is Southern California Edison's finding and so on.

Senator WALLOP. If you do not trust them to run it, why would you trust them to monitor?

Mr. WHITNEY. I don't believe I ever said I don't trust them to run it.

Senator WALLOP. Well, I gather the gist of your testimony is that their maintenance requirements and their maintenance in fact have not been entirely beneficial to the park; that these things that you have identified as reasons for the committee and the Congress to go slow are not as a result of what the Park Service has not done, but what you think bear witness to that Southern California Edison has done.

So if you have a complaint about the way it has been operated, why would you lay upon them the task of providing the monitoring?

Mr. WHITNEY. First of all, the comments specifically are taken out of a report that was prepared at Congress' request and to answer to your question specifically, in a situation where there is a special permit granted for use of a national park by a private entity—in this case, an investor-owned utility—you have the opportunity to require the person benefiting from that special use permit to do certain things in monitoring——

Senator WALLOP. I know we have the opportunity. I am asking you, why would you have them do it when it seems to be your testimony that they are not doing a good job of what they are doing?

Mr. WHITNEY. Well, that's a good point and perhaps the National Park Service should be required to more extensively monitor the facilities as well. That's a good point. I appreciate that.

Senator WALLOP. With what?

Mr. WHITNEY. Perhaps their resource management staff could be redirected some way. It is a limited staff out there and it is a problem. That's another reason for asking——

Senator WALLOP. Why isn't it better just to proceed pretty much the way it has been charged within the resolution that will in fact maintain a slightly higher standard than you say has been maintained? That would be the simplest, the most straightforward, the most efficient way of achieving it.

Mr. WHITNEY. Would there be language included in the legislation or the legislative history requiring the stepped-up level of concern or consideration given to them? That would be a solution, certainly.

Senator WALLOP. Then on the abandonment and removal requirement, why would we now set terms for an event that might occur in 10 or 20 years? It might be that in 10 or 20 years, both the Park Service and events in time would have outstripped the imagination that we poor mortals can bring upon it.

Mr. WHITNEY. That's true. You are saying perhaps at some point in time, you wouldn't want to remove the facilities?

Senator WALLOP. Precisely.

Mr. WHITNEY. That provision was in the existing permit which expired December 14. So our statement was essentially trying to effectuate what National Park Service has told us was the status quo.

I would assume that if in 20 years, the Park Service decided that they did not want Southern California Edison to remove upon abandonment, Southern California Edison probably would not object to that decision on the part of the Park Service and they could come to the Congress and seek a revision of that language.

Senator WALLOP. They could come to the Congress and achieve it the other way, too, could they not?

Mr. WHITNEY. Pardon me?

Senator WALLOP. They could come to the Congress and achieve it the other way, too, could they not?

I guess what I am saying is, I do not see that we do much for efficient management or anything else by making requirements that lie way out in the future, when Congresses beyond us can change them, and where there really is no demonstrated need to do that.

That is my problem. I think it sort of sounds good that we have got a piece of accountability written in there, but you and I both know that it need not last, and why would we come to undo something when we come better to do something?

Mr. WHITNEY. That is a good point. I think you need to realize that these are very old structures. And there are differing opinions on the structural integrity of them. So within the timeframe provided for at least in the House language, we're talking potentially 30 years from now, and I believe that's the year 2016. There is a strong likelihood that within the timeframe provided in the House bill that Southern California Edison may choose to walk.

In that case, it may be best to cover our backsides, if you will, for the Park Service to have this in there. Should they choose to take a different position they can come back and change it. To come in in 15 or 20 years and ask that Southern California Edison be required to remove at that time would probably be quite difficult.

Senator WALLOP. Mr. Gilfoy.

Mr. GILFOY. Mr. Chairman, I might point out, the House resolution, as passed, contemplates that after the initial 10-year term, the proposed new permit and a renewal at that time will come back and lie before Congress for 60 days and at that time Congress, if it chooses to do so, may take any action on it it wishes.

Senator WALLOP. I personally am comfortable with that because I can't have the foggiest notion in my mind what a Congress 10 years from now might be going to do.

Mr. GILFOY. Surely. So we're not looking at 30 years from now.

Senator WALLOP. I don't hear you suggesting that a permit should not be renewed at all. Or do I hear incorrectly?

Mr. WHITNEY. Pardon me?

Senator WALLOP. Is it your proposal that the permit not be renewed at all?

Mr. WHITNEY. That's our fundamental position.

Senator WALLOP. That it should not be renewed at all?

Mr. WHITNEY. That's right.

Senator WALLOP. What would you have done with it?

Mr. WHITNEY. We would have this use of National Park resources cease and desist and allow the natural riparian system to be restored back to the natural condition.

Senator WALLOP. With no room for the facilities?

Mr. WHITNEY. To the extent that it is practicable to do so. Certainly there may be areas where firms are very high or on a precipitous incline or something where it's just clearly better to leave them hidden, obscured by vegetation and so on, unless fire rages through there.

But there are other areas, particularly those areas that are particularly obtrusive along General's Highway, where the inversions take place, where you get equipment in there that tear up the facilities. A couple of high spring flows and you wouldn't know that they were.

So there is a compromise in there somewhere where some facilities may be allowed to remain and some should be removed.

Senator WALLOP. But I guess what I hear you say is that we are not certain what removal we would require now, how can we be certain what removal we would require in 10 years?

Mr. WHITNEY. Well, perhaps what can be done is that can be negotiated as part of the permit, recognizing the responsibility——

Senator WALLOP. By us, in law, trying to second-guess what part of the negotiations the renewal of the permit would be. I just would assume that what we're doing is authorizing the renewal of a permit, not suggesting the precise details of it. As I hear you testifying here, we are probably not capable of doing it in precise detail.

Also, the language now contains—shall contain such other terms and conditions of the Secretary of the Interior as shall be necessary and proper.

We've already done about as much as can be done within here, unless we send a committee of Congress out to make our decision as precisely as we can as to what can and cannot be removed. I do not think that is very efficient.

Mr. WHITNEY. If I might respond, a couple of points. One is, we are not certain what the Secretary of the Interior in 1986 may include as necessary and appropriate, nor are we certain in 10 years, whomever is Secretary may include.

And the next point is, you do have documentation which shows there is a need for some conditions. This was a congressional request. The information has been provided, so we are just suggesting it may be appropriate for the Congress to respond to what has been provided to them, not all the nitty-gritty details, mind you, but I listed five key things.

There is some question over the restoration upon abandonment. That's fine. But there are four others that are brought up in here or we feel should be considered generically, specifically by the Congress. And it's mostly a result of what's been done for you.

Senator WALLOP. Thank you, Mr. Whitney. Thank you, Mr. Gilfoy.

The subcommittee stands adjourned.

[Whereupon, at 11:25 a.m., the hearing was adjourned.]

Appendix

Responses to Additional Committee Questions

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

MAR 10 1986

Honorable Malcolm Wallop
Chairman, Subcommittee on Public Lands,
Reserved Water, and Resource Conservation
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Senator Wallop:

Enclosed are our answers to the questions submitted for the record by Senator Bumpers concerning S.J. Res. 221 and H.J. Res. 382.

Sincerely,

P. Daniel Smith
Deputy Assistant Secretary for
Fish and Wildlife and Parks

Enclosure

QUESTIONS FOR THE RECORD
SUBMITTED BY SENATOR DALE BUMPERS

For P. Daniel Smith, Department of the Interior

1. In its report to Congress on the impact of the operations of the Kaweah hydroelectric facility on Sequoia National Park, the National Park Service outlined three concerns which it believes should be addressed in legislation authorizing the renewal of California Edison's special use permit.

A. the need to maintain a minimum flow level of the Kaweah River;

B. control over the access and types of equipment used in maintenance of the facilities; and

C. clarification of the responsibility of Southern California Edison for the removal of the facilities and site restoration in case of abandonment of the Kaweah facilities within the Park.

Both H.J.Res. 382 and S.J.Res. 221 would allow the Secretary of the Interior to impose terms and conditions in the permit which the Secretary deems necessary for the protection of the Park's resources.

Why would the Park Service prefer to have these concerns addressed in the reauthorizing legislation rather than in the language of the special use permit.

ANSWER: The National Park Service does not insist that these concerns be addressed in the statutory language itself but rather in the legislative process that authorizes the special use permit. As stated in my testimony, the study of the impacts of Kaweah No. 3 on the park resources required by the 1974 law resulted in an insufficient amount of adverse impacts to prompt the National Park Service's objection to the relicensing of the Kaweak No. 3 project. However, the National Park Service believes that the three concerns should be included in the special use permit. We would like to point out that these conditions have been included in previous special use permits.

What we did request in our testimony, however, was specific language that authorizes and limits the separate processes of relicensing and permitting to ten-year renewable periods of time, not language specifying the terms and conditions of a special use permit. Unless the joint resolution includes specific provision on this subject, FERC would not have the authority to license that portion of the project within Sequoia National Park.

2. How would you characterize the relationship between the National Park Service and Southern California Edison concerning the Kaweah facility?

ANSWER: Excellent.

IN REPLY REFER TO

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

1760(140)

MAR - 3 1986

Honorable Malcolm Wallop
Chairman, Subcommittee on Public Lands, Reserved
Water, and Resource Conservation
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Senator Wallop:

This is in response to your letter of January 30, 1986, in which you asked that we reply to additional questions submitted by Senator Bumpers following the recent hearing on H.R. 3851 before the Public Lands, Reserved Water, and Resource Conservation Subcommittee. Answers to the questions are enclosed.

Thank you for the opportunity to respond to the Subcommittee.

Sincerely,

James M. Parker

Acting Director

Enclosures

Response to Questions submitted by Senator Bumpers:

1. Q What is the current status of conveyances to Native Corporations under the Alaska Native Claims Settlement Act?

   A As of December 31, 1985, Alaska Native Corporations have been conveyed 34,583,473.86 acres by 1148 Interim Conveyance Documents and 476 Patents.

2. Q How many of the conveyances are potentially subject to challenge on the issue of navigability?

   A All of the conveyances made pursuant to the Alaska Native Claims Settlement Act are subject to challenge on the issue of navigability.

3. Q What is the Department's position on S. 485?

   A The Department of the Interior has not yet taken a position on S. 485. However, provisions of the bill appear to be similar to those in the final rulemaking for 43 CFR Part 2650 (Alaska Native Selections: Amendment Changing the Chargeability of Submerged Lands) published in the Federal Register (50 FR 15446) on April 19, 1985, a copy of these regulations is enclosed for your information.

58-930 O - 86 - 5

(Sec. 111(c), and 112(d) Clean Air Act (42 U.S.C.) 7411(c) and 7412(d))

Dated: April 4, 1985.

Stanley Laskowski,

Acting Regional Administrator.

[FR Doc. 85-9342 Filed 4-18-85; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 2650

[Circular No. 2882]

Alaska Native Selections; Amendment Changing the Chargeability of Submerged Lands

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rulemaking.

SUMMARY: This final rulemaking will amend the provisions of the Alaska Native Selection regulations to change the procedures used for excluding meanderable water bodies from acreage charged against the entitlements of Alaska Native Corporations. This amendment will implement a policy decision of the Secretary of the Interior.

EFFECTIVE DATE: May 20, 1985.

ADDRESS: Any suggestions or inquiries should be sent to: Director (311), Bureau of Land Management, 1800 C Street, NW., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT:

B. LaVelle Black, (202) 343-6511

or

Robert C. Bruce, (202) 343-8735.

SUPPLEMENTARY INFORMATION: A proposed rulemaking was published in the **Federal Register** on August 7, 1984 (49 FR 31475). The proposed rulemaking invited public comments for 60 days ending on October 9, 1984, with a notice of extension providing for an additional 45 days for public comment being published in the **Federal Register** on October 22, 1984 (49 FR 41266). During the comment period, comments were received from seven sources, two from Native corporations, one from a Native organization, one from a State government, one from a private individual, one from a public interest group and one from a Federal agency. The comments have been carefully reviewed and the action taken on them is discussed below.

Generally, the comments favored the establishment of the new procedures for chargeability of submerged lands provided in the proposed rulemaking. One comment suggested that the proposed rulemaking was defective and invalid because it provided insufficient factual background and explanation. Without adequate information, the public cannot make appropriate comment on the purpose of the proposed rulemaking. This comment went on to suggest that the proposed rulemaking was contrary to public policy and violated specific provisions of the Alaska Native Claims Settlement Act because no environmental impact statement was prepared and the requirements of section 810 of the Alaska National Interest Lands Conservation Act were not followed. After careful review, the comment was not accepted and the final rulemaking adopted the provisions of the proposed rulemaking with only one significant change, the removal of the provision on underselection. The proposed rulemaking stated that it was being issued to implement a change in policy announced by the Secretary of the Interior with the policy statement being explained in the **Federal Register** on December 5, 1983 (48 FR 54483). That policy statement dealt with the issue of submerged lands and their chargeability, an issue that has been the subject of discussion for many years, including policy papers prepared by the Federal-State Land Use Planning Commission. The issue is one that is clearly understood by those that would be affected by its implementation. Further, section 910 of the Alaska National Interest Lands Conservation Act excludes actions, including issuance of regulations, leading to the issuance of conveyances to Alaska Natives or Native Corporations under provisions of the Alaska Native Claims Settlement Act from the preparation or submission of an environmental impact statement. Finally, the provisions of section 810 of the Alaska National Interest Lands Conservation Act are not applicable to conveyances made under the Alaska Native Claims Settlement Act.

One comment suggested that § 2650.5-1(b)(3) of the proposed rulemaking be deleted from the final rulemaking because it was seen as requiring a navigability determination on rivers and lakes smaller than the criterion used in determining whether title passed to the State of Alaska at statehood. This comment was not adopted because the elimination of § 2650.5-1(b)(3) would eliminate all navigability determinations. In addition, the State of Alaska has expressed its support for this provision of the proposed rulemaking, while retaining the right to challenge a decision to convey submerged lands beneath lakes less than 50 acres in size or a river or stream less than 3 chains in width. The elimination of all navigability determinations would eliminate the ability to make navigability determinations in those instances where the State of Alaska challenges a conveyance of submerged lands. The final rulemaking retains § 2650.5-1(b)(3).

Another comment on § 2650.5-(b)(3) interpreted it to permit the conveyance of submerged lands beneath navigable water to a Native Corporation. This section applies only to lands retained in Federal ownership at the time of Statehood and does not pertain to any submerged lands granted to the State in the Submerged Lands Act (67 Stat. 29). Rather than retain Federal ownership to these submerged lands which are primarily sloughs and potholes subject to tidal influence within the boundaries of Native conveyances, the Department of the Interior will excerise its authority under the Alaska Native Claims Settlement Act and convey the lands to the adjoining upland owners.

Two comments recommended changing §§ 2651.4(i) (1) and (2) to allow the withdrawal of lands within the conservation system units for villages that may be underselected. After carefully reviewing the issues raised by the comments and the impact of the provisions of the proposed rulemaking on the question of selection and withdrawal of lands for the Native Corporations, the Department of the Interior has decided to remove the changes made by the proposed rulemaking to §§ 2651.4(i) (1), (2), (3) and (4) in their entirety. This will provide additional time for the Department to thoroughly review and make a decision on the question of what lands should be made available for those corporations that would be underselected as a result of the change in policy on the chargeability of submerged lands and what changes in the selection regulations, if any, will be made.

Two comments recommend for various reasons that the final rulemaking delete § 2651.4(i)(4) of the proposed rulemaking. For the reason cited above, § 2651.4(i)(4) has been deleted by the final rulemaking.

One comment suggested that the final rulemaking remove the reference to section 12(b) of the Alaska Native Claims Settlement Act that appears in § 2651.4(i)(1) of the proposed rulemaking. The comment argued that the reference is not needed because section 14(a) of the Act is the authority for conveying selections made under both 12(a) and (b) of the Act. The final rulemaking has not adopted this suggestion because the final rulemaking

4/19/85

has removed § 2461.4(j)(1) and the comment is no longer applicable.

One comment suggested that the final rulemaking should make mention of the fact that the Natives in the Koniag region are not entitled to additional withdrawals because of the language in section 1427(n) of the Alaska National Interest Lands Conservation Act. This suggestion was not adopted because the final rulemaking is not deemed to need a reference to Koniag, Inc.; the language of the Alaska National Interest Lands Conservation Act is sufficient.

A final comment recommended that the final rulemaking contain language that no newly withdrawn lands could be conveyed until all validly selected lands have been conveyed. The preamble to the proposed rulemaking clearly stated that a village corporation will be required to take patent to all previously validly selected lands. This clear statement of Department of Interior policy makes it unnecessary to add this requirement as a specific provisions of the final rulemaking and the suggestion has not been adopted.

Editorial and grammatical corrections as needed have been made.

The principal author of this final rulemaking is B. LaVelle Black, Alaska Programs Staff, Bureau of Land Management, assisted by the staff of the Office of Legislation and Regulatory Management, Bureau of Land Management.

The Department of the Interior has determined that this document is not a major rule under Executive Order 12291 and that it will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

The change in procedure made by this final rulemaking will allow Alaska Native Corporations to receive larger amounts of upland acreage because it changes the procedures used to exclude water bodies from their selection entitlement. The change will benefit many of the Alaska Native Corporations; however, the change should not have a major economic effect on any of the corporations.

The proposed rulemaking contains no information collection requirements which require the approval of the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 43 CFR Part 2650

Administrative practice and procedure, Airports, Alaska, Cemeteries, Historic places, Indians—claims, Indians—lands, National forest, National Wildlife Refuge System, Public lands—grants, Public lands—mineral resources.

Under the authority of the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601 et seq.), Part 2650, Group 2600, Subchapter B, Chapter II of Title 43 of the Code of Federal Regulations is amended as set forth below.

Loone A. Pavez,

Acting Assistant Secretary of the Interior.

April 10, 1985.

PART 2650—[AMENDED]

1. Section 2650.0–5 is amended by adding a new paragraph (v) to read:

§ 2650.0–5 Definitions.

* * * * *

(v) "Native corporation" means any Regional Corporation, any Village Corporation, Urban Corporation and any Native Group.

2. Section 2650.5–1 is amended by revising paragraph (b) to read:

§ 2650.5–1 General.

* * * * *

(b) The following procedures shall be used to determine what acreage is not to be charged against Native entitlement:

(1) For any approved plat of survey where meanderable water bodies were not segregated from the survey but were included in the calculation of acreage to be charged against the Native corporation's land entitlement, the chargeable acreage shall, at no cost to the Native corporation, be recalculated to conform to the principles contained in the Bureau of Land Management's *Manual of Surveying Instructions*, 1973, except as modified by this part. Pursuant to such principles, the acreage of meanderable water bodies, as modified by this part, shall not be included in the acreage charged against the Native corporation's land entitlement.

(2) For any plat of survey approved after December 5, 1983, water bodies shall be meandered and segregated from the survey in accordance with the principles contained in the Bureau of Land Management's *Manual of Surveying Instructions*, 1973, as modified by this part, as the basis for determining acreage chargeability.

(3) If title to lands beneath navigable waters, as defined in the Submerged Lands Act, of a lake less than 50 acres in size or a river or stream less than 3 chains in width did not vest in the State on the date of Statehood, such lake, river or stream shall not be meandered and shall be charged against the Native corporation's entitlement.

(4) Any determinations of meanders which may be made pursuant to this subparagraph shall not require monumentation on the ground unless specifically required by law or for good cause in the public interest.

3. Section 2651.4(b) is amended by removing from the second sentence thereof the phrase "or a section in which a body of water comprises more than one-half of the total acreage of a section."

[FR Doc. 85–9560 Filed 4–18–85; 8:45 am]

BILLING CODE 4310–84–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Ch. I

[FCC Docket No. 78–72; Phase III; FCC 85–98]

MTS and WATS Market Structure Policies and Requirements; Report and Order

AGENCY: Federal Communications Commission.

ACTION: Report and Order establishing policies and requirements.

SUMMARY: The Order addresses three issues, which were set forth for comment in our Notice of Proposed Rulemaking in the MTS and WATS Market Structure proceeding, published in the **Federal Register** on January 8, 1983, 48 FR 28632: (a) whether independent telephone companies should implement equal access interconnection projects according to a phased timetable; (b) the appropriate institutional arrangements for the joint planning of interexchange and local distribution networks and national security and emergency preparedness (NSEP) communications; and (c) whether the access tariffs of local exchange carriers should be modified to incorporate details pertaining to technical and operational details of interconnection, and interconnection with non-carriers. This action is taken in recognition of the arguments cited by the parties in this proceeding.

EFFECTIVE DATE: April 19, 1985.

FOR FURTHER INFORMATION CONTACT: Raymond Dujack, (202) 632–9342.

SUPPLEMENTARY INFORMATION:

Report and Order

In the matter of MTS and WATS Market Structure Phase III: Establishment of Physical Connections and Through Routes among Carriers; Establishment of Physical Connections by Carriers with Non-Carrier Communications Facilities; Planning among Carriers for Provision of Interconnected Services, and in Connection with National Defense and Emergency Communications

State of Alaska
OFFICE OF THE GOVERNOR
WASHINGTON, D.C.

February 18, 1986

The Honorable Malcolm Wallop
Chairman
Senate Committee on Energy and
Natural Resources
Senate Subcommittee on Public
Lands, Reserved Water and
Resource Conservation
308 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Mr. Chairman:

Senator Bumpers has submitted four questions to the State of Alaska concerning the hearing on H.R.3851. The following are the State's responses:

1. What is the status of the State of Alaska's litigation on Section 901 of the Alaska National Interest Lands Conservation Act (ANILCA)?

   The State of Alaska filed suit in December, 1981, challenging the constitutionality of Section 901(a). The case was stayed at the request of all of the parties in the spring of 1983, so that alternative remedies could be pursued in Congress. At that time, the parties were in the preliminary stages of discovery. After several extensions, the stay expired last fall. Since then, there has been no further activity on the case.

2. What is the gist of the State's constitutional challenge to that provision of ANILCA?

   The State's constitutional challenges to Section 901(a) are brought under equal footing and due process principles. Underlying the Section 901(a) controversy is the basic principle that pursuant to the equal footing doctrine, the State took title to submerged lands beneath navigable waters upon entry into statehood. Section 901 places a time limitation on the ability of the State to assert its claim to land that already belongs to it. Although all states currently must deal with the limitations period in the Quiet Title Act of 1972, no other state has a provision

comparable to Section 901 of ANILCA placed on its ability to assert sovereign land claims. Beyond the strict legal merits of this contention, it seems inequitable that Alaska should be singled out for different treatment than other states.

There is also a due process claim based on the sheer magnitude of the task of identifying land that might be subject to the limitations period in sufficient time to bring an action under Section 901. Much of the land being conveyed by the federal government in Alaska has yet to be surveyed. As a result, many land transfers are accomplished by tentative approval to Natives, Native Corporations, or the State. Existing conveyances are often inaccurate because of poorly prepared survey plats, poor photographing or mapping, or lack of mapping.

These problems, combined with the continuing uncertainty concerning criteria for determining navigability in Alaska, create a situation where the limitations period simply is not a sufficient period of time. Accordingly, the State contends in its complaint that the statute of limitations in Section 901 amounts to a taking of the State's property without adequate protections of due process. A copy of the complaint will be submitted to the Subcommittee shortly for your information.

3. How does the State reconcile its support for an extension of the statute of limitations (H.R.3815) with its position in this litigation?

The State supports a one-year extension of the statute of limitations because it will provide additional time to resolve the issue, either through comprehensive legislation or a court decision. This is consistent with our challenge to the constitutionality of the limitations period.

As long as there has not been a decision in the court case, the limitations period remains in effect. Without a permanent resolution of the issue or an interim extension of the limitations period, the State would be required to bring numerous lawsuits to protect its claims to certain lands. The first of those suits will be brought by the State on or before February 24, 1986, unless the issue is resolved earlier. Such litigation will perpetuate, rather than end, conflicts and uncertainties regarding acreage chargeability and ownership of submerged lands in the State. It could also cause unnecessary and unwanted friction between the State and the Native community.

4. What is the State's position on S.485?

The State strongly supports the enactment of S.485. Our reasons for this support were summarized in my written testimony submitted to your Subcommittee on January 30. A copy of these remarks is enclosed for your ready reference.

In essence, the State supports S.485 for two principal reasons. First, it would permanently repeal the statute of limitations provided in Section 901(a) of ANILCA. As a consequence, much expensive and unnecessary litigation would be avoided, and the pattern of navigability lawsuits in Alaska would approximate that of the Lower 48 states. Second, S.485 would give legislative sanction to the 1983 decision of the Secretary of the Interior to apply the BLM Survey Manual to State and Native conveyances in Alaska. This legislative confirmation would ensure equality of treatment between such conveyances and the transfer of public lands in other states. It should also be noted that several studies demonstrate that the amount of additional acreage which would be transferred under the approach embodied in S.485 is not great. Therefore, impacts on federal land management would be relatively small.

In recognition of the considerations summarized here, the State, the Department of the Interior, and the Alaska Native community support the enactment of S.485.

Thank you for this opportunity to comment further on the subject matter of your January 30 hearing. If I can provide additional information, please let me know.

Sincerely,

John W. Katz

John W. Katz
Director of State/Federal
Relations and Special
Counsel to the Governor

Enclosure

cc: Senator Ted Stevens
Senator Frank Murkowski
Congressman Don Young

State of Alaska
OFFICE OF THE GOVERNOR
WASHINGTON, D.C.

February 26, 1986

The Honorable Malcolm Wallop
Chairman
Senate Committee on Energy and
Natural Resources
Senate Subcommittee on Public
Lands, Reserved Water and
Resource Conservation
308 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Mr. Chairman:

In my February 18, 1986, letter to you which responded to questions raised by Senator Bumpers on H.R.3851, I indicated that we would forward a copy of the State's complaint challenging the consitutionality of Section 901(a) of ANILCA. Enclosed for the information of the Subcommittee, is the State's Amended Complaint for Declaratory and Injunctive Relief.

Please let us know if we can provide any further information.

Sincerely,

John W. Katz

John W. Katz
Director of State/Federal
Relations and Special
Counsel to the Governor

Enclosure

WILSON L. CONDON
ATTORNEY GENERAL
Michael W. Sewright
Assistant Attorney General
420 "L" Street, Suite 100
Anchorage, Alaska 99501
(907) 276-3550

Attorney for Plaintiff
State of Alaska

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

STATE OF ALASKA, ALASKA SPORTSMEN'S COUNCIL, et al.,	)	
Plaintiffs,	)	
vs.	)	No. A81-483 CIV.
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

AMENDED COMPLAINT OF THE
STATE OF ALASKA FOR DECLARATORY AND
INJUNCTIVE RELIEF PURSUANT TO PRETRIAL ORDER

I

NATURE OF ACTION

1. This is a civil action to have subsections (a) and (c) of Section 901 of the Alaska National Interest Lands Conservation Act (hereinafter "ANILCA"), Public Law 96-487, 94 Stat. 2430, enacted December 2, 1980, declared unconstitutional, invalid and void. To the extent subsection 901(h) impairs the right of the State of Alaska to have the illegality of any provision of Section 901 declared on the merits, it too is illegal. Subsection 901(a) imposes illegal limitations on the State of Alaska's ability to obtain title to specific parcels of previously vested submerged trust lands, thereby impairing the State's sovereign entitlement and effectively divesting said State -- and it alone among the states -- of

this sovereign title by unconsitutional means. Subsection 901(c) illegally taxes the State of Alaska -- and it alone among the states -- for the costs and attorney fees of other parties in legal actions brought by the State to obtain title to parcels of submerged land covered by subsection 901(a). Subsection 901(h) seeks to impose a one-year statute of limitations upon actions brought by the State of Alaska contesting the legality or authority of the United States to legislate on the subject matter of Section 901. The legality or authority of the United States to legislate on other provisions of Section 901 is not contested, unless shown by additional discovery or the effect of judicial interpretation to illegally impair the sovereignty of the State of Alaska.

2. This is also an action for a judicial declaration and judgment on the scope of Section 901 of ANILCA and on the effect and meaning of various provisions of Section 901; specifically:

(a) Subsection 901(g): The State of Alaska contends that the herein-above contested provisions of section 901 are inapplicable, by the intent and terms of said enactment, to Alaska's sovereign submerged land rights which derive from sources other than the Submerged Lands Act of 1953 (67 Stat. 29, 43 U.S.C. § 1301). Alaska's entitlement to sovereign submerged lands reserved by operation of the United States Constitution, the equal footing doctrine and the enabling language of the Alaska Statehood Act (which declared the State of Alaska "admitted into the Union on an equal footing with the other States in all respects whatever") is not affected or in any way diminished by the challenged provisions of Section 901, which according to subsection 901(g) apply only to submerged land rights first granted the State of Alaska pursuant to the Submerged Lands Act of 1953, supra, and Section 6(m) of the Alaska Statehood Act.

(b) Subsection 901(a): An immediate and substantial controversy as to the meaning and effect of subsection (a) of Section 901 of ANILCA, which is uncertain in its terms, now exists between the plaintiff and defendants which affects their rights and legal relations. Plaintiff contends that the reference "parcel of submerged land" contained within subsection 901(a) is unclear in its meaning. It is unknown and unclear whether the referenced "parcel" which must be made the subject of litigation within the time limitations provided in subsection (a) is intended to apply only to lands underlying inland navigable waters, or also to all tidelands and lands underlying tidally-influenced inland waters. The intended extent in size of said "parcel" is unclear, and it is unknown and unclear whether said "parcel" means lands submerged as of the date of Statehood, date of conveyance, date of lawsuit, or some other date, since what constitutes a "parcel" of "submerged" land changes over time according to changing water flow patterns and changing high water marks. Said "parcel" is unidentifiable and incapable of fixed location given the changing characteristics over time of water bodies in Alaska and application of the rule of ownership up to changing ordinary high water mark, thus altering continuously what constitutes "submerged land", whereas subsection 901(a) seems premised on a concept of fixed submerged lands.

Plaintiff contends also that the reasonable and necessary interpretation of subsection 901(a) is that the time periods for filing a civil action for judicial determination of the ownership of a parcel of submerged land conveyed by the Federal Government to a Native Corporation or Group must commence to run upon the date of execution of any interim conveyance or patent which purports to convey said "parcel", including the latest in time, particularly where (according to current Federal Government practices) all interim conveyances are made expressly subject to issuance of a patent years later

actually locating the boundaries and lateral extent (and thus the "parcel") of said submerged land by subsequent survey.

Further, plaintiff contends that, under the foregoing circumstances, the judicial determination of ownership contemplated by subsection 901(a) must be something less than a final judgment forever quieting title to sovereign submerged lands in private ownership contrary to the State's interest, or else said provision is illegal.

The defendants contend that the reference to "parcel of submerged land" contained in subsection (a) is clear and that the "parcel" is sufficiently identifiable for protection of the State's interest and assertion of its claims of public ownership of said land within the time periods specified by ANILCA. The defendants also contend that subsection 901(a) means that any "parcel" of "submerged" land contained within the approximately 44 million acres of Native conveyance areas becomes owned by the Native Corporation or Group to which it is conveyed, and the government and public of the State of Alaska are forever divested of their title and interest in said land, unless a civil action to assert State ownership is filed within five or seven years after execution of the first federal conveyance document -- whether by interim conveyance or patent -- encompassing said "parcel", wherever located, under whatever type waters, and whatever its size, and despite the fact a final patent actually purporting to locate the boundaries of said submerged land will not be issued by the Federal Government until years later (even after the time limitation has run). According to the defendants, Section 901 of ANILCA requires that any challenge to Native title must be filed in the United States District Court within the requisite time limits contained in subsection 901(a), whether the challenge to Native title be to all the acreage under a contested water body, to only a few acres under a small segment of water body,

or to only one acre of submerged land -- all constitute a "parcel" of submerged land.

(c) Subsection 901(a): It is unknown and unclear, and a matter of much uncertainty impairing the rights of the State of Alaska, how precisely a "parcel" of submerged land which becomes the subject of the civil action contemplated by subsection 901(a) must be identified and fixed in said action, and whether said provision is intended to fix the boundaries of said parcels of submerged lands within Native conveyance areas, irrespective of subsequent modifications of the location of said "parcel" as a result of accretion, erosion, reliction, and other real property alterations which have always been a matter of State (not Federal) law. It is uncertain whether subsection 901(a) is intended to unlawfully supplant State property law with a new Federal property law which applies only to the sovereign submerged lands of the State of Alaska.

(d) Subsection 901(c): An immediate and substantial controversy as to the meaning and effect of subsection (c) of Section 901 of ANILCA, which is uncertain in its terms, now exists between the plaintiff and defendants which affects their rights and legal relations; namely, whether the money judgment provided for in subsection 901(c) "in an amount equal to [the Native Corporation or Group's] costs and attorney's fees," requires that the full actual costs and attorney's fees incurred by a prevailing defendant Native Corporation or Group in such a civil action be awarded, whatever the amount, or whether some lesser reasonable fee may be awarded, and whether it is the intent of subsection 901(c) that said money judgment be awarded against the State of Alaska.

II

JURISDICTION

3. This Court has jurisdiction to hear and decide the issues raised in this action, and the defendants are

properly named, by virtue of Article III of the United States Constitution, 28 U.S.C. § 1331, 28 U.S.C. § 2201, and subsection 901(h) of ANILCA wherein Congress contemplates this action. This action presents federal questions and an actual case or controversy appropriate for declaratory relief. The amount in controversy in this action exceeds in value the amount of $10,000, exclusive of interest and costs.

III

PARTIES

4. The plaintiff State of Alaska (herein also referred to as "plaintiff" or "the State") is the sovereign State of Alaska, one of the fifty sovereign states of the United States of America, admitted to the Federal Union on January 3, 1959, pursuant to the Alaska Statehood Act, Public Law 85-508, 72 Stat. 339 (1958), and is the legal representative and trustee of the people of the State of Alaska in this action.

5. Defendant United States of America (herein also referred to as "defendant", the "Federal Government", or the United States"), is the government of the federal Union comprised of the fifty United States. Said defendant, through its Congress, enacted and intends to administer the challenged provisions of ANILCA. Defendant William French Smith, named in his official capacity, is Attorney General of the United States and in that capacity is responsible for enforcing and defending laws enacted by Congress, including Section 901 of ANILCA. Defendant James Watt, named in his offical capacity, is Secretary of the United States Department of the Interior, is responsible for administering and defending the provisions of ANCSA and ANILCA, including Section 901 of ANILCA, and ultimately responsible for determinations by his Department on the navigability of water bodies within Native conveyance areas and for conveying lands to Alaska Native Corporations and Groups pursuant to ANCSA and ANILCA.

IV

GENERAL ALLEGATIONS

6. The defendant United States of America first acquired the shores and lands underlying tidal waters and nontidal inland navigable waters (hereinafter "sovereign submerged lands") upon the United States' purchase of Alaska in 1867 from Russia by the Treaty of Cession concluded March 30, 1867 (15 Stat. 539). Said sovereign submerged lands were held in trust by the United States for the future State of Alaska, a legal condition specifically recognized and reaffirmed by Congress as early as the Alaska Right of Way Act of 1898, Section 2 (30 Stat. 409), which declared, inter alia, that title to Alaska's tidelands and beds of its navigable waters shall not be impaired and "shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said Territory."

7. The Alaska Statehood Act, supra, was enacted on July 7, 1958, and offered admission to the Territory of Alaska as a State of the federal Union upon the terms of the Act. Said terms were accepted by a vote of the people of the Territory on August 26, 1958, thus forming a statehood compact between the United States and the people of the Territory and State, which cannot be unilaterally amended. The State of Alaska was thereafter admitted to the Federal Union by Presidential Proclamation on January 3, 1959.

8. The Alaska Statehood Act provides, inter alia, as follows:

> That, subject to the provisions of this Act, and upon issuance of the proclamation required by Section 8(c) of this Act, the State of Alaska is hereby declared admitted into the Union on an equal footing with the other States in all respects whatever. . . . (Emphasis added.)

Section 6(m) of the Alaska Statehood Act provides:

> The Submerged Lands Act of 1953 (Public Law 31, 83rd Cong., 1st Sess.; 67 Stat. 29) shall be applicable to the State of

> Alaska and the said State shall have the same rights as do existing States thereunder. (Emphasis added.)

9. Upon its admission to the Union, the State of Alaska, as in the case of the other states admitted before and after it, became immediately vested with absolute title to the sovereign submerged lands underlying tidal and nontidal navigable waters within the boundaries of the State, free of any federal claim of title or federal principle of land title, as an incident of Statehood and under the State's rights of admission to the Union on an equal footing with the original states according to the Alaska Statehood Act and the United States Constitution. The State of Alaska holds these submerged lands underlying said waters in trust for the people of Alaska for purposes consistent with that public trust. The Federal Government has no power to defeat or hinder that ownership by grant, act of its Congress, or otherwise.

10. The Alaska Natives Claims Settlement Act (herein also referred to as "ANCSA"), Public Law 92-203 (85 Stat. 688), enacted December 18, 1971, entitles the Alaska Natives recognized therein (also referred to herein as "Native Corporation(s) or Group(s)") to select and have conveyed to them approximately forty-four (44) million acres of land in Alaska, subject to valid existing rights. Because the State's ownership of its sovereign submerged lands vested upon statehood under rights stemming from the United States Constitution, the Submerged Lands Act of 1953 and the Alaska Statehood Act, prior to the enactment of ANCSA, these lands are unavailable for selection by or conveyance to Alaska Native Corporations or Groups under the terms of ANCSA or otherwise.

11. Nevertheless, the Department of the Interior of the United States, through its Secretary of the Interior and his Bureau of Land Management ("BLM"), upon the mere basis of its own determinations of non-navigability of waters and its own failure to exclude submerged sovereign trust lands properly

owned by the State, has wrongfully conveyed and, upon information and belief, will wrongfully continue to convey to Alaska Native Corporations or Groups in private ownership submerged lands which are the real property of the State of Alaska and all its citizens.

12. On December 2, 1980, the Congress of the United States enacted subsection (a) of Section 901 of ANILCA, which provides as follows:

> Notwithstanding any other provision of law, the ownership by a Native Corporation or Native Group of a parcel of submerged land conveyed to such Corporation or Group pursuant to the Alaska Native Claims Settlement Act or this Act, or a decision by the Secretary of the Interior that the water covering such parcel is not navigable, shall not be subject to judicial determination unless a civil action is filed in the United States District Court within five years after the date of execution of the interim conveyance if the interim conveyance was executed after the date of enactment of this Act, or within seven years after the date of enactment of this Act if the interim conveyance was executed on or before the date of enactment of this Act. If a parcel of submerged land was conveyed by a patent rather than an interim conveyance, the civil action described in the preceding sentence shall be filed within five years after the date of execution of the patent if the patent was executed after the date of enactment of this Act, or within seven years after the date of enactment this Act if the patent was executed on or before the date of enactment of this Act. The civil action described in this subsection shall be a de novo determination of the ownership of the parcel which is the subject of the action.

Therefore, according to the defendants and under a possible interpretation of said provision, the State must now challenge in the United States District Court any conveyance by the Federal Government of any portion of submerged land -- wherever located, under whatever type waters, whatever its size, and up to its ordinary high water mark, wherever that is -- when conveyed to an Alaska Native Corporation or Group, within five years after the Federal interim conveyance or

patent, whichever comes first, purporting to convey the land after December 2, 1980, or within seven years of the first purported conveyance where executed on or before December 2, 1980 -- or forever lose public ownership of that land although previously vested in the State.

13. Also on December 2, 1980, the Congress of the United States enacted subsection (c) of Section 901 of ANILCA, which provides as follows:

> If the court determines that a parcel of submerged land which is the subject of a civil action described in subsection (a) is owned by the Native Corporation or Native Group to which it was conveyed pursuant to the Alaska Native Claims Settlement Act or this Act, each defendant Native Corporation or Native Group shall be awarded a money judgment against the plaintiffs in an amount equal to its costs and attorney's fees, including costs and attorney's fees incurred on appeal.

Therefore, according to the defendants and under a possible interpretation of said provision, the State of Alaska, in the event its challenge to the ownership of a parcel of submerged land conveyed to an Alaska Native Corporation or Group is unsuccessful, must pay to each defendant corporation or group its actual costs and attorney's fees, but the State of Alaska is not given a corresponding and equal right to recover costs or attorney's fees if it prevails.

14. The people of the State of Alaska have not ratified either subsection (a) or (c) of Section 901 of ANILCA.

15. No other state's right to assert ownership over its sovereign submerged lands has been conditioned in the past by such a statute of limitations and other restrictions as are contained in ANILCA subsection 901(a), or by such a taxation of costs and attorney's fees as that contained in subsection 901(c). Other states, with significantly fewer submerged lands than Alaska, are still allowed to bring -- and are bringing -- claims over 100 years after their statehood, without a statutory imposition for the costs and attorney's fees of

others burdening their claims. Nor was a limitation on the time in which Alaska could assert its ownership of sovereign submerged lands, or an imposition for costs and fees, contained in the Alaska Statehood Act, nor could such conditions have properly been imposed in said Act under the equal footing doctrine applied to all States.

16. Serious, substantial and indeed impossible obstacles lie in the way of asserting state ownership, and then obtaining individual judicial determinations, with regard to all submerged lands within Native conveyance areas during the time constraints imposed by Section 901 of ANILCA. The identification of navigable waters in Alaska is a matter wherein the State and Federal governments have long disagreed. Disagreements have also arisen, and are likely to continue to arise, with respect to determinations on the lateral extent of submerged land underlying navigable and tidally-influenced waters, and under current BLM conveyance practices most of these disagreements will not become apparent with respect to specific lands until many years in the future. To a substantial degree, binding determinations on navigability and the lateral extent of submerged land ownership will have to be made by the courts. These determinations promise to be difficult, expensive, and time consuming. What level and type of uses establish "navigability" is a developing area of law especially unsettled in Alaska because of a number of conditions, such as floatplane and winter use, which are unique to the State. The determination in each case often turns on the individual physical characteristics and evidence of historical use of the particular water body. The accumulation of evidence of historical use and physical characteristics of even one water body can take several months, involving extensive research and field interviews, in addition to time consumed by actual trial where necessary. The problems associated with establishing navigability, along with likely

disagreements in the future regarding the lateral extent of submerged land ownership, make it extremely difficult to even identify those water bodies which are likely to be judicially determined navigable, much less determine the extent of submerged land ownership in that event. Many thousands of water bodies exist within the approximately forty-four (44) million acres of Native selections and within additional acres of Native over-selections. The lands underlying a substantial number of these water bodies are sovereign submerged lands in fact belonging to the State of Alaska.

17. Even in those instances where the defendants determine waterways to be navigable and ownership of lands underlying those waterways to be in state ownership, the defendants nevertheless issue interim conveyances of land to Alaska Native Corporations and Groups without fixing the boundaries of said lands and expressly make said interim conveyances subject to a later patent after survey which is to fix the boundaries (and thus the actual "parcel") of the excluded submerged lands. Upon information and belief, few of these surveys have been conducted and will not be completed until many years in the future, most (and possibly all) long after the limitation periods for challenging a conveyance of submerged land by initial patent or interim conveyance under subsection 901(a) have expired. Subsection 901(a), by its operation, deprives the State of any real opportunity to contest these survey determinations, by which the lateral extent and boundaries of submerged land are to be ultimately determined, or to contest the ownership of the land ultimately conveyed by final patent, and thus deprives the State of any real remedy even under the terms of said subsection and the statutory scheme of Section 901 of ANILCA. Moreover, the defendants make no attempt in interim conveyances to exclude tidelands by location, but exclude them by mere mention that all tidelands (however far inland they may be located) are

excluded subject to later survey and patent, again conducted and issued too late for the State to assert its rights under the constraints of subsection 901(a). Similar difficulties resulting in no effective remedy for the State under subsection 901(a) exist in the case of all of defendants' present determinations with respect to submerged lands encompassed within Alaska Native selection and over-selection areas. Nor do defendants' interim conveyances, patents or surveys address the issue of future changing locations of submerged lands owing to accretion, erosion, reliction and water flow activity. Accordingly, the statutory scheme contained in subsection 901(a) affords the State no realistic remedy to assert its right to ownership of sovereign submerged lands within Native conveyance areas, because by operation of subsection 901(a) -- especially in conjunction with defendants' conveyance practices -- there is no reliable way to know what submerged lands the defendants are attempting to convey to Native Corporations and Groups contrary to the State's ownership rights, and what submerged lands the defendants are not attempting to convey. Therefore, subsection 901(a) by application deprives the State of its vested sovereign lands without remedy or due process of law.

18. The contested statutory framework of Section 901 seeks to regulate the State of Alaska as a state, interferes with matters of state sovereignty, and directly impairs Alaska's ability to obtain its sovereign entitlement to sovereign submerged lands. Although ownership of said lands vested in the State of Alaska upon statehood, legally recognized ownership of specific parcels of said lands can be obtained only by court judgment. Subsections (a), (c), and (h) of Section 901 of ANILCA, by imposing limitations periods during which actions to obtain judgment must be instituted and by taxing the State of Alaska with the costs and attorney's fees of other parties, require a serious and substantial

reallocation and diversion of governmental attention, resources, manpower and monies from other traditional governmental functions, in a vain attempt to comply with and satisfy the limitations of said federal provisions, thereby interfering with and impairing Alaska's ability to structure its traditional governmental function of protecting and preserving its sovereign submerged lands and the public trust interest therein.

19. The effect of the statute of limitations imposed by subsection 901(a) of ANILCA will be to burden the governmental resources and functions of the State of Alaska and to divest it of at least much of its title to sovereign submerged lands, the conveyance of which into private ownership by BLM can not be -- and should not have to be -- challenged by the State within the unreasonably short limitation periods and other constraints of the challenged provisions of Section 901.

20. The chilling, unfair and unconstitutional effect of the costs and fees provision in subsection 901(c) of ANILCA restructures and impairs the governmental functions and resources of the State of Alaska, discriminates against and singles out for special mistreatment the State and its citizenry, and will discourage the State of Alaska from asserting its ownership of many sovereign submerged lands, with the result that the State's entitlement to sovereign submerged lands will be impaired and in many instances effectively divested, especially in combination with the additional limitations of subsection 901(a).

21. It is burdensome, difficult and indeed impossible for the State of Alaska and its citizens with a reasonable expenditure of time and money to investigate and, if necessary, challenge within the limitation periods all of the conveyances of sovereign submerged lands which the BLM has made and will make to Native Corporations and Groups. As a result, the State of Alaska and its citizens will be unlawfully divested of their

title to lands which were granted to the State of Alaska at the time of its admission to the Union.

22. The effect of the restrictions contained in Section 901, subsections (a), (c), and (h), is that the right of the State of Alaska and its citizens to use and own the sovereign submerged lands acquired under the Alaska Statehood Act and the United States Constitution will be materially impaired, diminished, and lost.

23. No other state has been burdened with such a statutory scheme or any similar scheme as is set forth in subsections 901(a), (c), and (h) of ANILCA.

COUNT I

24. As its first cause of action plaintiff realleges and incorporates by reference the allegations of paragraphs 1 through 23 of this complaint, and further alleges as follows:

25. Subsections 901(a), (c), and (h) of ANILCA are in violation of the equal footing doctrine of the United States Constitution and United States Supreme Court decisional law, incorporated by reference in the Alaska Statehood Act. Said subsections are invalid and void as a matter of law because to permit the restrictions is to admit the State of Alaska on a less-than-equal footing with other states.

COUNT II

26. As its second cause of action plaintiff realleges and incorporates by reference the allegations of paragraphs 1 through 23 of this complaint, and further alleges as follows:

27. Subsections 901(a), (c), and (h) of ANILCA are invalid and void as being in violation of the vested rights of the State of Alaska according to the terms of the Alaska Statehood Act, which cannot be amended unilaterally.

COUNT III

28. As its third cause of action plaintiff realleges and incorporates by reference herein the allegations of

paragraphs 1 through 23 of this complaint, and further alleges as follows:

29. Subsections 901(a), (c), and (h) of ANILCA are invalid and void because said subsections on their face and as applied impair, infringe upon, and violate the sovereignty of the State of Alaska reserved and guaranteed by the Tenth Amendment of the United States Constitution.

COUNT IV

30. As its fourth cause of action plaintiff realleges and incorporates by reference herein the allegations of paragraphs 1 through 23 of this complaint, and further alleges as follows:

31. Subsections 901(a), (c), and (h) of ANILCA are invalid and void because said subsections, both on their face and as applied to bar or restrict the State's claim to sovereign submerged lands, result in an uncompensated and arbitrary taking by the Federal Government of State sovereign trust property for private purposes in violation of the Fifth Amendment of the United States Constitution.

COUNT V

32. As its fifth cause of action plaintiff realleges and incorporates by reference herein the allegations of paragraphs 1 through 23 of this complaint, and further alleges as follows:

33. Subsections 901(a), (c), and (h) of ANILCA are invalid and void because the provisions of said subsections, both on their face and as applied to bar or restrict the State's claim to sovereign submerged lands, constitute an unlawful attempt to extinguish the rights of the State of Alaska and its citizens in sovereign trust lands arbitrarily and capriciously, without due process of law in violation of the Fifth Amendment of the United States Constitution.

COUNT VI

34. As its sixth cause of action plaintiff realleges and incorporates by reference herein the allegations of paragraphs 1 through 23 of this complaint, and further alleges as follows:

35. Subsections 901(a), (c), and (h) of ANILCA are invalid and void because the provisions of said subsections constitute an unlawful attempt to deny the citizens of Alaska equal protection in an arbitrary and capricious manner, by requiring the State of Alaska -- but no other state -- to file all claims to its citizens' sovereign submerged lands within a prescribed statutory period and pay its opponents' costs for any such claims which may prove unsuccessful, all in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

COUNT VII

36. As its seventh cause of action plaintiff realleges and incorporates by reference herein the allegations of paragraphs 1 through 23 of this complaint, and further alleges as follows:

37. Subsections 901(a), (c), and (h) of ANILCA are invalid and void because the provisions of said subsections constitute an unlawful attempt to deny the citizens of Alaska the privileges and immunities of the citizens of the several states in violation of Article IV, Section 2 of the United States Constitution as applied to Federal actions through the Fifth Amendment.

COUNT VIII

38. As its eighth cause of action plaintiff realleges and incorporates by reference herein the allegations of paragraphs 1 through 23 of this complaint, and further alleges as follows:

39. Subsections 901(a), (c), and (h) of ANILCA are invalid and void because the provisions of said subsections

constitute an unlawful Federal attempt to destroy the inalienable public trust character by which the State of Alaska holds these sovereign submerged lands, by making an absolute grant of said lands into private ownership where they will no longer be subject to such public trust.

COUNT IX

40. As its ninth cause of action plaintiff realleges and incorporates by reference herein the allegations of paragraphs 1 through 23 of this complaint, and further alleges as follows:

41. Even if subsections 901(a), (c), and/or (h) of ANILCA are valid, they are limited in their applicability to only those submerged lands to which the State first became entitled pursuant to the Submerged Lands Act of 1953 and Section 6(m) of the Alaska Statehood Act, as opposed to that greater number of submerged lands to which the State became entitled by the United States Constitution, the equal footing doctrine, and the enabling provision of the Alaska Statehood Act, as an incident of Alaska's sovereignty.

COUNT X

42. As its tenth cause of action plaintiff realleges and incorporates herein by reference the allegations of paragraphs 1 through 23 of this complaint, and further alleges as follows:

43. A dispute exists as to the statutory construction of subsections 901(a), (c), and (g) of ANILCA as hereinabove specified and this Court should judicially interpret the meaning and applicability of said subsections so as to declare the rights of plaintiff as hereinabove contended, as well as toll the running of the limitation periods contained in subsection 901(a) until the interpretation of said subsections is judicially determined.

V

PRAYER FOR RELIEF

WHEREFORE, plaintiff State of Alaska prays as follows:

1. That the Court interpret subsections 901(a), (c), and (g), determine the rights of the plaintiff herein under said subsections, impose a stay against or otherwise toll the running of the limitation periods contained in subsection (a) until said subsection is judicially interpreted, and declare subsections 901(a), (c), and (h) of the Alaska National Interest Lands Conservation Act unconstitutional, void, and unenforceable as a matter of law for the reasons hereinabove stated;

2. For any other relief the Court deems to be just and equitable, including costs and attorney's fees, and interest thereon, incurred by plaintiff in this action.

RESPECTFULLY SUBMITTED at Anchorage, Alaska, this 16th day of July, 1982.

WILSON L. CONDON
ATTORNEY GENERAL
STATE OF ALASKA

By: M W Sewright
Michael W. Sewright
Assistant Attorney General

(76)

The undersigned hereby certifies that on the 19th day of July 1982 the attached documents were mailed to the attorneys of record. Pickering, Lake Ennis, Carlson

Yelena Bonk

Subscribed and sworn to before me the date last written

Carol H. Johnson

Notary Public
My Commission Expires 12/14/85

Southern California Edison Company

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RECD FEB 12 12 39

February 4, 1986

Senator Malcolm Wallop
Chairman, Subcommittee on Public Lands
Reserved Water and Resources Conservation
Committee on Energy and Natural Resources
Washington, D.C. 20610

Re: S.J. Res. 221 and H. J. Res. 382

Dear Senator Wallop:

This is in response to your letter of January 30, 1986, with which you forwarded questions asked by Senator Bumpers following the Subcommittee Hearing on January 30, 1986. The questions and our responses thereto follow:

(1) The National Park Service has enumerated three specific concerns it believes should be addressed in the provisions of the special use permit. What is Southern California Edison Company's position on each of these proposed provisions?

A. Maintenance of a minimum flow level of the Kaweah River.

We agree that minimum flow levels should be addressed in the special use permit and we would expect to be able to work out the appropriate levels with the Park Service. In this regard we have enclosed a copy of our recently expired Special Use Permit from the Park Service and call your attention to condition No. 16 which deals with water releases. We anticipate that the same release schedule, or something very close to the same, could and probably would be worked out with the Park Service for inclusion in any new permit that may be issued.

B. Park Service control over the access and types of equipment used in maintenance of the facility.

To the best of our knowledge there has never been any problem relative to access or the types of equipment used by Edison in maintaining its facilities. Edison has conducted itself in a manner that gives recognition to Park values and to Park Service policies. For

example, even though the use of helicopters is the easiest way to maintain some of the back-country dams, Edison does not use this means of access whenever the Park Service, at certain high level use times of the year, requests us not to do so.

We would have no objection to reducing these past practices, relative to access and equipment use to writing and including them as a condition in the Permit if this is the Park Service's preference.

C. Clarification of Southern California Edison Company's responsibility for the removal of the facilities and site restoration in case of the abandonment of the Kaweah facility.

You will note that both conditions No. 7 and No. 24 in the enclosed permit deal with this problem. They do not appear to be entirely consistent in that condition No. 7 seems to require absolute removal and restoration of the site, whereas condition No. 24 only requires removal and then only to the extent "as may be determined by the Superintendent to be both feasible and necessary." We believe that condition No. 24 is the one that the Park Service intended to be operative in the event of abandonment and would agree to its inclusion in the new permit if we were dealing with the same facilities today as we were ten years ago. However, during the interim, to wit in 1978 under the National Parks and Recreation Act of that year, the Park was expanded to include four Edison dams in the back country of the Mineral King Valley. These dams are in a remote, inaccessible area of the Park and we do not believe that it would be practicable or feasible to remove them under any circumstances. Moreover, their removal could not help but cause serious environmental damage, much more so than abandoning them in place. In any event, based on prior experience, we feel confident that the appropriate criteria for removal and/or restoration can be negotiated with the Park Service at the local level.

(2) How would you characterize the relationship between Southern California Edison Company and the National Park Service regarding operations of the Kaweah facility?

The relationship between Southern California Edison Company and the Park Service in Sequoia Park has been excellent. We have worked very hard to maintain this kind of relationship through the years and it is our judgment that the Park Service has done the same thing. That this is

a point of view shared by the Park Service was confirmed by P. Daniel Smith, Deputy Assistant Secretary of the Interior, during his testimony before your Subcommittee on January 30. I do not yet have a transcript from those proceedings available for direct quotation, but my recollection is that he referred to Edison as being a good neighbor in the Park and that an excellent relationship exists.

I trust that the foregoing adequately answers Senator Bumper's question, but if not or if you or any of the other Subcommittee members or their staffs have further questions, please let me know.

Sincerely,

TOM P. GILFOY

TPG:bjs

cc: P. Daniel Smith
Steven C. Whitney